TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 856.

DAVID BARNET AND ISAAC E. CRAIG, ASSIGNEES OF BARNETS AND WHITESIDE,
PLAINTIFFS IN ERROR,

vs.

THE MUNCIE NATIONAL BANK OF MUNCIE, INDIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 12, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 856.

DAVID BARNET AND ISAAC E. CRAIG, ASSIGNEES OF BARNETS AND WHITESIDE,

PLAINTIFFS IN ERROR,

vs.

THE MUNCIE NATIONAL BANK OF MUNCIE, INDIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Journal entry, docketing cause	1	1
Petition	2	1
Precipe	5	3
Summons	5	3
Marshal's return	6	4
Separate answer and cross petition of Robert Marshal	7	4
Separate answer and cross petition of David Barnet and Isaac E. Craig	11	6
Motion to strike out	15	9
Motion to strike out	17	10
Demurrer	17	10
Demurrer	19	11
Reply	20	11
Reply	21	12
Demurrer	23	13
Answer of David Barnet to cross petition of Robert Marshal	24	13
Demurrer	26	15
Demurrer	27	15
Journal entry, motion to strike second defense in answer of Robert Marshal from files, sustained	27	15
Journal entry, plaintiff's demurrer to third defense in answer of David Barnet *et al.* sustained	28	16

Journal entry, plaintiff's motion to strike out first defense in answer of David Barnet *et al.* overruled	29	16
Amended third defense of David Barnet *et al.*, assignees	31	17
Petition for removal	34	19
Affidavit of F. T. White	35	20
Bond	36	20
Motion to remove case to U. S. circuit court at Cincinnati, Ohio	38	21
Demurrer of Barnet and Craig, assignees, to petition for removal	39	21
Journal entry, demurrer to petition for removal overruled	39	22
Proceedings in the United States circuit court, southern district of Ohio	41	22
Petition	41	22
Journal entry, rule to answer	44	24
Separate answer and cross petition of Barnet and Craig, assignees,	45	25
Separate answer of Robert Marshal	50	28
Answer of David Barnet to cross petition of Robert Marshal	56	31
Journal entry, default set aside	58	32
Demurrer of Muncie National Bank to answer and cross petition of Barnet and Craig, assignees	58	32
Demurrer of Muncie National Bank to answer of Robert Marshal	59	32
Journal entry, leave to reply	60	33
Reply, Muncie National Bank	60	33
Journal entry, demurrer of plaintiff to answer and cross petition of Barnet and Craig, assignees, sustained as to first and third defenses, and overruled as to the second defense; leave to reply in five days	62	34
Plaintiff's reply to second defense of Barnet and Craig, assignees	62	34
Journal entry, demurrer of plaintiff to first, third, and fourth defenses of Robert Marshal overruled; leave to reply in five days; demurrer to second defense sustained	64	35
Reply of Muncie National Bank to the first, third, and fourth defenses of Robert Marshall	65	35
Journal entry, motion to strike from reply redundant matter overruled	68	37
Demurrer to reply of plaintiff	68	37
Journal entry, demurrer to reply of plaintiff overruled	69	37
Journal entry, leave to amend answer	70	38
Amended answer	70	38
Journal entry, jury sworn	72	39
Journal entry, verdict	73	39
Error bond	74	40
Journal entry, judgment	75	41
Clerk's certificate	77	41
Writ of error	78	42
Citation	81	42
Petition for writ of error	82	43

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house, at Cincinnati, in said district, on the first Tuesday in April, being the fourth day of that month, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth.

Present, the Honorable Philip B. Swing, district judge.

Among the proceedings had were the following, to wit:

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHAL, *et al.*
} No. 2053.—Money.

Be it remembered that heretofore, to wit, on the sixth day of April, in the year of our Lord one thousand eight hundred and seventy-five, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL, *et al.*
} No. 2053.—Money.

Order Docketing Cause.

This cause coming into this court upon a certified copy of the papers from the court of common pleas of Preble county, Ohio, it is hereby ordered that the same be docketed in this court, which is accordingly done; which is in the words and figures following, to wit:

2 Court of common pleas of Preble county, Ohio.

THE MUNCIE NAT. BANK OF INDIANA, Pltff.,
vs.
ROBERT MARSHAL, DAVID BARNET; and JAMES BARNET, LEWIS BARNET, WILLIAM BARNET & WILLIAM WHITESIDE, partners, as BARNET & WHITESIDE, Defts.
} Petition.

The above named plaintiff, the Muncie National Bank of Indiana, now comes, by Foos and Fisher, its attorneys, duly authorized in the premises, and says that it is a corporation duly incorporated and organized in accordance with the laws of the United States and the State of Indiana, and doing business at the town of Muncie, at the county of Delaware, in said State of Indiana. It further says that this its action is founded on a bill of exchange, of which the following is a copy, with all credits and endorsements thereon, to wit:

"$4,000.00. MUNCIE, INDIANA, *Nov.* 18, 1873.

Ninety days after date of this only bill of exchange pay to the

order of Robert Marshall, at the Second Nat. Bank, Cincinnati, four thousand dollars, value rec'd, without any relief from valuation and appraisement laws, and charge to account of yours. The drawers and endorsers dispense with notice of non-acceptance and non-payment of bill, and protest to be evidence of present-
ment. And if suit be instituted on this bill, the drawer,
3 endorsers and acceptors promise to pay 5 per cent. attor-
ney's fees, and the costs and charges for the collection thereof, with ten per cent. interest after maturity until paid; for value received.

DAVID BARNET.

To Barnets & Whiteside, Camden, Ohio.
Endorsed: Robert Marshall."

There are no credits on said bill of exchange. The defendant, David Barnet, is liable on said bill as drawer, and the def'ts, James Barnett, Lewis Barnett, William Barnett, and William Whiteside, partners, as Barnetts & Whiteside are liable thereon as acceptors, and the def't, Robert Marshall, is liable on said bill as endorsors.

That on or about the 18th day of November, 1873, the said James Barnett, Lewis Barnett, William Barnett, and William Whiteside, partners, as Barnetts & Whiteside, accepted said bill, and on or about the 18th day of November, 1873, the said Robert Marshall endorsed and delivered the said bill to this plaintiff. On the day said bill became due no part of it was paid, although then presented to the said Barnetts & Whiteside for payment at the counter of the Second National Bank of Cincinnati, and payment then and there demanded and refused, and said bill was duly protested, of all of which the said David Barnet, and the said Robert Marshall, had due notice.

Plaintiff further says, that said bill was drawn, endorsed and returned to it, in the State of Indiana; that by the laws of said State of Indiana, in full force at the time said bill was drawn, it was lawful for the drawers and acceptors of a bill of exchange
to stipulate in writing thereon, for the payment of any rate
4 of interest not exceeding ten per cent., and it was also
lawful at said time, by said laws of said State of Indiana, for the drawers and acceptors of a bill of exchange to stipulate on said bill, in writing, with the payee or endorsee thereof; that in case said bill had to be collected by law, the said drawers and acceptors and endorsers would pay the amount of attorneys' fees for collection thereof, as stated in the bill.

There is due from the defendant, to the plaintiff, on said bill the sum of $4,000.00, which it claims, with interest at the rate ten per cent., from the 19th day of February, 1874, and for which, with $1.28 costs on protest, and 5 per cent on said sum of

$4,000.00, the interest for attorneys' fees for collection, it prays judgment.

FOOS & FISHER,
Att'ys for Plaintiff.

THE STATE OF OHIO,
Preble County, ss:

J. H. Foos, being sworn, says that he is one of the att'ys of record for the plaintiff in this action. That said plaintiff is a foreign corporation, and located and doing business beyond the territory of this State, in the town of Muncie, in the State of Indiana; that he believes the statement contained in the above petition to be true.

J. H. FOOS.

Sworn to and subscribed before me, by J. H. Foos, March 16, 1874.

W. D. QUINN, *Clerk.*
By B. F. LARSH, *Deputy.*

5 Preble common pleas.

THE MUNCIE NATIONAL BANK OF INDIANA
vs.
ROBERT MARSHALL, DAVID BARNETT & JAMES BARNETT, LEWIS BARNET, WILLIAM BARNETT & WILLIAM WHITESIDE, Partners as BARNETTS & WHITESIDE, Defts.

Issue a summons returnable according to law. Amount claimed $4,000.00, with 10 per cent interest from February 19th, 1874; also $1.28 cost of protest, and 5 per cent. on said $4,000.00, and interest for attorney's fees for collection.

FOOS & FISHER,
Attys for Pltff.

To W. D. Quinn, clk.; March 16th, 1874.
Endorsed: Filed March 16, 1874.

W. D. QUINN, *Clk.*
By R. F. LARSH, *Dept.*

THE STATE OF OHIO,
Preble County, ss:

To the Sheriff of the County of Preble:

You are commanded to notify Robert Marshall, David Barnet, and James Barnet, Lewis Barnet, William Barnet, and William Whitesides, partners as Barnet & Whitesides, defendants,
6 that they have been sued by Muncie National Bank of Indiana, pltff. Amount claimed $4,000.00, with 10 per

cent. interest from Feb. 19, 1874; also $1.28 costs of protest, and 5 per cent. on said $4,000.00, and interest for attorney's fees for collection in the court of common pleas of Preble county, and that unless they answer by the 18th day of April, A. D. 1874, the petition of the said Muncie National Bank of Indiana, plaintiff, against them, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make true return of this summons on the 30th day of March, A. D. 1874.

Witness my hand and the seal of said court, at Eaton, this 16th day of March, A. D. 1874.

[SEAL.] W. D. QUINN, *Clerk.*
By B. F. LARSH, *Deputy.*

Received this writ March 16, A. D. 1874, at 4 o'clock p. m., and in obedience to the command thereof I, on the 30th day of March, A. D. 1874, served the within named Robert Marshall, William Whiteside, and James Barnet by handing each of them a duly certified copy of the within summons, and D. Barnet, Lewis Barnet, and Wm. Barnet by leaving at their usual place of residence a duly certified copy of the within summons.

JOHN TOUNSEND,
Sheriff P. Co.

Endorsed: Summons in action for amount claimed, $4,000, with 10 per cent. interest from February 19, 1871, and
7 also $1.28 costs of protest, and 5 per cent. on said $4,000, and interest for attorney's fees for collection, to 30th day of March, 1874. Returned and filed 30th March, 1874

W. D. QUINN, *Clerk.*

PREBLE COUNTY, OHIO,
Court of Common Pleas:

Separate Answer and Cross Petition of Robert Marshall.

THE MUNCIE NATIONAL BANK OF INDIANA, Pltff.,
vs.
ROBERT MARSHALL *et al.*, Defts.

The deft., Robert Marshall, now comes, and for his separate answer to the petition, and, by way of cross petition, says for his first defense:

I. On or about the 18th day of May, 1872, the said David Barnet, defendant, drew a bill of exchange upon said Barnets & Whiteside, in favor of this defendant, (for the accommodation of said Barnets & Whiteside,) for the sum of $4,000, payable at 90 days, at said Second National Bank of Cincinnati, Ohio, which said bill of exchange was indorsed by this defendant (for the accommodation of said Barnets & Whiteside, and without consideration,) accepted by said Burnets & Whiteside, and was by them

presented to plaintiff, about the date named, for discount; and said plaintiff, with a full knowledge of the facts, advanced and loaned to said Barnets & Whiteside, for said bill of exchange, the sum of $3,786.00, and no more, reserving as interest and exchange thereon, the sum of $124.00.

8 This defendant further says that said original bill of exchange, with the said drawer, endorser, and acceptor, has been renewed as follows:

On or about the 18th day of August, 1872.
On or about the 18th day of November, 1872.
On or about the 18th day of February, 1873.
On or about the 18th day of May, 1873.
On or about the 18th day of August, 1873.
And on or about the 18th day of November, 1873.
Which last renewal bill is the foundation of this suit.

And this defendant avers that at each renewal of said bill of exchange at the times named, the said plaintiff received from said Barnets & Whiteside the sum of $124.00 as interest and exchange upon the bill given in renewal of its predecessor, and making in all the sum of $744 paid by said Barnets & Whiteside to plaintiff as interest and exchange on said original loan of $3,876.00, which sums so charged and received were usurious, and were at a greater rate of interest (including current rate of exchange) than pltff. was authorized to receive, take, or charge by the laws of the United States, or by the laws of the State where said bank was and is located. All of which was well known to plaintiff at the several times named. Whereby plaintiff forfeited said sum of of $744, so paid as interest and exchange. And said Barnets & Whiteside are entitled to have twice said amount, to wit: the sum of $1,488, applied to the payment and reduction of the principal of said original loan of $3,876, leaving amount due thereon $2,388 only, and which sum is all that plaintiff is entitled to recover from any of the parties to said bill of exchange in any event.

9 II. For a second defense to said petition this deft. says that Barnets & Whiteside and the parties for whose benefit said several bills of exchange (including the one described in the petition) were drawn and endorsed, and are primarily liable thereon; that David Barnet, defendant, became a party to said bill, as the drawer thereof, before this deft. became a party thereto as indorser, and is, next to Barnets & Whiteside, liable thereon, and that this deft. is only liable, if at all, in the event that the pltff. fails to make the amount due thereon out of the property of said Barnets & Whiteside and David Barnet.

III. For a third defense to said petition defendant says he denies he delivered said bill of exchange to plaintiff. He denies that said bill was indorsed in the State of Indiana, but avers that

he indorsed the same in Preble county, Ohio, where he resides. And he denies the right of plaintiff to demand anything of him as attorney's fees.

IV. For a fourth defense to said petition this defendant says that he adopts the averments of his second defense in relation to the order in which the several defendants became parties to said bill of exchange, and avers therewith, and says that on or about the —— day of ———, 1874, the plaintiff, without the knowledge or consent of this defendant, entered into an arrangement with David Barnet, deft., the drawer of said bill of exchange, whereby it extended the time of payment thereof to said Barnet for a valuable consideration, and thereby released and discharged this defendant from all liability on said bill.

This defendant therefore prays that he may, under the
10 facts averred in his fourth defense, be dismissed with his costs; and if the said fourth defense does not avail him, then he prays that he, as surety, may be substituted to all the rights accruing to his principals by reason of the facts stated in his first defense; that all interests forfeited and penalties may be applied to the payment and reduction of the original loan.

That David Barnet may be found to be first liable next to the acceptors of said bill; that execution may be ordered to run accordingly; and for such other and further relief as equity and the nature of the case may require.

MILLER & HARRIS,
CAMPBELL & GILMORE,
Attys. for Deft. Marshall.

THE STATE OF OHIO,
Preble County, ss:

Robert Marshall, defendant being sworn says that he believes the statements of the foregoing answer and cross petition are true.

ROBT. MARSHALL.

Subscribed and sworn to before this May 15, 1874.

W. D. QUINN, *Clerk.*

Endorsed: Filed May 15, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

11 Preble common pleas.

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*

Separate Answer and Cross-Petition of David Barnet and Isaac E. Craig.

Now come the defendants, David Barnet and Isaac E. Craig,

assignees of Barnet & Whiteside, and for their answer say that by a deed of assignment for benefit of creditors to them executed and delivered by James Barnet, Lewis Barnet, William Barnet, and William Whiteside, on the 27th day of December, 1873, and proceedings relative thereto in the probate court of Preble county, Ohio, they became duly qualified under the said assignment, and entered on the execution of the trust on or about —— day of January, 1874. Prior to the time of making said assignment the defendants herein, who composed the firm of Barnets & Whiteside, and who made the assignment as above stated, had been ever since January 11, 1866, borrowers of large amounts of money from the plaintiff, for which the exorbitant and unlawful discounts taken by the plaintiff contributed in no small measure to the final ruin and insolvency of the said firm. Their indebtedness to the plaintiff has been unbroken and continuous since April 8, 1866; since then it has at no time been less than $4,000; reached at one time $36,000, and was at the date of the assignment of the firm $28,000. Upon bills of exchange representing this indebtedness the plaintiffs have taken by way of discounts, each of which was illegal, an amount
12 on excess of $15,000. That for purposes of evading and defeating the operation of laws against usury the plaintiffs have kept this debt represented by a number of different bills at the same time, requiring of their debtors a renewal and discount every 90 days, and causing a break to be made in the continuity of each series of bills with such frequency as this alleged purpose suggested, but these defendants aver that it was all in fact but one debt; that there has been paid thereon by Barnets & Whiteside illegal interest largely in excess of the sum for which this suit is brought. These defendants further say that the plaintiff has received payment and satisfaction of the entire indebtedness of the said firm to them except so far as represented by the bill set forth in the petition, and for the reasons set forth they are entitled to no recovery in this action.

2*d*. These defendants for second defense say: That on or about the 21st of November, 1871, the plaintiff discounted a bill for Barnets & Whiteside of that date for $4,000; that the plaintiff paid for said bill but $3,876.00, reserving to itself $124.00. Said bill was for 90 days, and has since at intervals of about 90 days been eight times renewed, as follows, to wit:

February 20, 1872.
May 18, 1872,
August 19, 1872.
November 19, 1872.
February 18, 1873.
May 20, 1873.
August 19, 1873.
November 18, 1873.

13 Which last named renewal is the bill set forth in the petition; on each of the said renewals the same discount was charged and paid as was reserved on the original bill, making, as the entire discount on the series, the sum of $1.116.00, which these defendants say should, even if their other defenses are disallowed, be applied as payment on the principal sum upon which the said usurious reservation and payment have been made; for by so reserving and taking the same the plaintiff has forfeited all claim to interest on any and all bills of this series.

3*rd*. As a third defense to the petition, these defendants say that within two years last past before the bringing of this action, Barnets & Whiteside have paid and reserved against them discounts of $124.00 each on bills for 90 days of $4,000 each by the plaintiff on fifty-one different and separate occasions, as follows, to wit: March 27th, 1872; April 5th, 1872; April 13th, 1872; April 27th, 1872; May 8th, 1872; May 18th, 1872; May 25th, 1872; June 3d, 1872; June 15th, 1872; July 4th, 1872; July 27th, 1872; Aug. 13th, 1872; August 19th, 1872; August 27th, 1872; Sept. 7th, 1872; Sept. 18th, 1872; Oct. 1st, 1872; Oct. 25th, 1872; Nov. 11th, 1872; November 19th, 1872; Nov. 25th, 1872; Dec. 6th, 1872; Dec. 18th, 1872; Dec. 31st, 1872; Jan. 23d, 1873; Feb. 7th, 1873; Feb. 18th, 1873; Feb. 24, 1873; March 6th, 1873; March 18th, 1873; March 31st, 1873; April 24th, 1873; May 6th, 1873; May 10th, 1873; June 27th, 1873; June 4th, 1873; June 17th, 1873; June 28th, 1873; July 25th, 1873; Aug. 9th, 1873; August 19th, 1873; Aug. 26th, 1873; Sept. 4th, 1873; Sept. 15th, 1873; Sept. 27th, 1873; Oct. 24th, 1873; Nov. 8th, 1873; Nov. 26th, 1873; Nov. 18th, 1873; Dec. 5th, 1873; Dec. 15th, 1873; amounting in all to the sum of $6,324.00;

14 each and every one of the aforesaid discounts were illegal, being in excess of the rate allowed to be taken by the plaintiff by the laws under which it is organized. By reason whereof there has accrued to these defendants a right of action against the plaintiff for twice the amount of excessive interest thus taken, which these defendants aver to be the full sum of $6,324.00. These defendants say, however, that of the said fifty-one discounts, seven are the same as a part of those set forth in their second defense; but of this their third defense forty-four discounts, amounting to $5,456.00, are separate from and independent of those shown in the second defense.

The defendants, therefore, pray that so much of the sum of $15,000, named in the first defense, as may be necessary to satisfy the plaintiff's claim, may be set off against it, and judgment given against plaintiffs for the sum of $6,324.00, named in the third defense, and for such relief as may be consistent with that which may be granted on their first and third offenses.

ISAAC E. CRAIG.

STATE OF OHIO,
Preble County, ss:

Isaac E. Craig, one of the defendants making the foregoing answer, says that the allegations contained and averments made in this answer are, as her verily believes, true.

ISAAC E. CRAIG.

Sworn to and subscribed before me, this 4th day of June, 1874.

W. D. QUINN, *Clk.*

15 (Endorsed.) Filed June 4th, 1874.

W. D. QUINN, *Clk.*

Preble common pleas.

MUNCIE NATL. BANK OF INDIANA, *Pltff.*,
vs.
ROBERT MARSHAL, *et al.*
} Motion to strike out.

And now comes the pltff., by Foos & Fisher, its attys., and moves the court to strike from the first defense contained in the answer of Daniel Barnet and Isaac E. Craig, assignees of Barnets & Whiteside, filed in this court the following language, to wit:

"Prior to the time of making said assignment the de-
"fendants herein, who composed the firm of Barnets &
"Whiteside, and who made the assignment as above
"stated, had been since January 11, 1866, borrowers of
"large amounts of money from the plaintiff, for which
"the exorbitant and unlawful discount taken by the
"pltff contributed in no small means to the final ruin and
"insolvency of said firm.

"Their indebtedness to the pltff. has been unbroken
"and continuous since April 8, 1866. Since then it has
16 "at no time been less than $4,000.00—reached at one time
"$36,000, and was at the date of the assignment of the firm
"$28,000, upon bills of exchange representing their in-
"debtedness. The plaintiff have taken by way of dis-
"count, each of which was illegal, an amount in excess of
"$15,000. That for purposes of evading and defeating
"the operation of laws against usury, the plaintiffs have
"kept this debt represented by a number of different
"bills at the same time, requiring of these debtors a re-
"newal and discount every 90 days, and causing a break
"to be made in the continuity of each series of bills
"with such frequency as this illegal purpose suggested;
"but these defendants aver that it was all in fact but
"one debt. That there has been paid thereon by Barnets
"& Whiteside illegal interest largely in excess of the
"sum for which this suit is brought. These defendants

"further say that the plaintiff has received payment and "satisfaction of the entire indebtedness of the said firm "to them, except so far as represented by the bill *bill* set "forth in the petition, and for the reasons above set forth "they are entitled to no recovery in this action."

For the reason that the same is irrelevant, and presents no state of facts material in the case.

FOOS & FISHER,
Attys. for Pltff.

17 (Endorsed.) Filed October 30, 1874.
W. D. QUINN, *Cl'k.*
By B. F. LARSH, *Dep'y.*

Preble common pleas.

MUNCIE NATIONAL BANK OF INDIANA, Pl't'ff,
vs.
ROBERT MARSHALL *et al.*, Def'ts.
} Motion to strike out.

And now comes the pl't'ff, by Foos and Fisher, its counsel, and moves to strike from the answer of the said Robert Marshall, filed in this cause, the whole of said second defense as therein numbered, and also the following language in the fourth defense, to wit:

"That he adopts the covenants of his second defense, "in relation to the order in which the several def'ts be- "came parties to said bill of exchange, and avers their "truth."

For the reason that the same is irrelevant and redundant, being a mere repetition of the facts set forth and admitted in the petition.

Wherefore, he prays that the same may be stricken from the record.

FOOS & FISHER,
Att'ys for Pl't'ff.

18 (Endorsed.) Filed Oct. 30, 1874.
W. D. QUINN, *Cl'k.*
By B. F. LARSH, *Dep't.*

Preble common pleas.

MUNCIE NATIONAL BANK OF INDIANA, Pl't'ff,
vs.
ROBERT MARSHALL *et al.*, Def'ts.
} Demurrer.

And now comes the pl't'ff, by Foos and Fisher, its counsel, and demurs to the first defense contained with answer of the said Robert Marshall, filed in this cause for reasons, to wit:

First. Because the facts stated in said defense are not sufficient in law to constitute a defense to pl't'ffs said action, either in whole or in part.

Wherefore, pl't'ff prays judgment whether it be compelled any other or further reply to make to said 1st defense.

FOOS & FISHER,
Att'ys for Pl't'ff.

(Endorsed.) Filed Oct. 30, 1874.

W. D. QUINN, *Cl'k.*
By B. F. LARSH, *Dep't.*

19 Preble common pleas.

MUNCIE NATIONAL BANK OF INDIANA, Pl't'ffs
vs.
ROBERT MARSHALL *et al.*, Def'ts. } Demurrer.

And now comes the pl't'ff, by Foos and Fisher, its counsel, and demurs to the third defense contained in the answer of David Barnet and Isaac E. Craig, assignees of Barnet & Whiteside, filed in this cause, for reasons, to wit:

First. Because the facts therein stated do not constitute a defense to the pl't'ff's said action, or entitle said def'ts to the relief therein asked.

Second. Because the matters therein contained are alleged as matters of defense, and not by way of cross-petition.

Third. Because the matter contained in said defense is the subject matter of an original action, and is not capable of being set up in this action as matter of defense or cross-petition.

Wherefore, the pl't'ff prays judgment whether he be compelled any other or further reply to make to said defense.

FOOS & FISHER,
Att'ys for Pl't'ff.

(Endorsed.) Filed Oct. 30, 1874.

W. D. QUINN, *Cl'k.*
By B. F. LARSH, *Dep't.*

20 Preble common pleas.

MUNCIE NATL. BANK OF INDIANA, Pltff.,
vs.
ROBERT MARSHALL *et al.*, Defts. } Reply.

And now comes the said pltff., by Foos & Fisher, its attys., and for reply to the 4th defense contained in the answer of said Robert Marshall, says:

That it denies that it made or entered into an arrangement with the deft., David Barnet, the drawer of said bill of exchange, whereby it extended the time of payment thereof. It denies it

made any arrangement with said Barnet whatever, or with any one else, for an extension of the time of payment on said bill. And having fully replied, prays judgment as in its petition already prayed.

FOOS & FISHER,
Attys. for Pltff.

THE STATE OF OHIO,
Preble County, ss:

Elain Fisher, being duly sworn, says that the plaintiff in this action is a corporation, doing business in the State of Indiana; that none of its officers reside or are now present in said county of Preble; that he is one of the attys. for said pltff., duly authorized in the premises, and that he believes the statements contained in the above reply to be true.

ELAIN FISHER.

21 Sworn to and subscribed before me by Elain Fisher, Oct. 30, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

(Endorsed.) Filed Oct. 30, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

Preble common pleas.

MUNCIE NATL. BANK OF INDIANA, Pltff.,
vs.
ROBERT MARSHALL *et al.*, Defts.
} Reply.

And now comes the above named plaintiff, by Foos & Fisher, its counsel, and for reply to the second defense contained in the answer of David Barnet and Isaac E. Craig, assignees of Barnets & Whiteside, says:

That it denies that the bill of exchange set forth in the petition was a renewal of any one of the bills set forth in said second defense or any other bill whatever, and avers that said bill was an original bill.

And for reply to the third defense in said answer contained, pltff. says that it denies that there was usury reserved in said bill. Pltff. says that at the time of the execution of said
22 bill it was located and doing business in the town of Muncie, in the county of Delaware, and State of Indiana, at which place said bill was discounted by it; that the drawer, acceptors, and endorsers, at the time they signed said bill, signed the same for the purpose, with the intention of having said bill discounted by the pltff., at said town of Muncie. Pltff. avers that by the laws of the State of Indiana, duly enacted and in

force at the time said bill was discounted by this plaintiff, it was lawful for the plaintiff to reserve on said discount interest at the rate of 10 per cent.; that 10 per cent. was reserved by it at the rate of ten per cent., and no more, and the further sum of one-half per cent. on the amount discounted, being the exchange on said draft, and which said sums were the whole amounts reserved by it in said bill.

Pltff. having fully replied, prays judgment as in its petition it hath prayed.

FOOS & FISHER,
Attys. for Pltff.

THE STATE OF OHIO,
Preble County, ss:

J. H. Foos, being sworn, says that he is one of the attorneys of record for the plaintiff in the above action, duly authorized in the premises; that the plaintiff is a foreign corporation, and has no office or officer in said county of Preble; that he believes the statements contained in the above reply to be true.

J. H. FOOS.

Sworn to and subscribed before me by J. H. Foos, this 7th day of Nov., 1814.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

23 Endorsed. Filed Nov. 7, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

Preble common pleas.

MUNCIE NATIONAL BANK
vs
ROBERT MARSHAL *et al.*

The defendant, Robert Marshall, now comes, and demurs to the answer filed by David Barnet, because said answer does not state facts sufficient to constitute a defense.

MILLER & HARRIS,
COUP & GILMORE,
For Marshall.

Endorsed. Filed Nov. 16, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

24 MUNCIE NATIONAL BANK, Pltff,
vs.
BARNETS & WHITESIDE, ROBERT MARSHALL & DAVID BARNET, Defts.

Answer of David Barnet to Cross-Petition of Robert Marshall.

Now comes David Barnet, and for his answer to the cross-

petition of Robert Marshall says that he was but an accommodation drawer of the bill set forth in the petition; that of this fact the defendant, Robert Marshall, was well aware at the time that he became the accommodation endorser thereof; that for a number of years last passed Barnets and Whiteside, the firm for the accommodation of which said bill was drawn and endorsed, have been heavily in debt, and up to the time of their assignment large borrowers of money from the plaintiff, as well as from other banks; that for at least five years before the said assignment this defendant, with other friends of the said insolvent firm, including Robert Marshall, had a continuing and binding agreement and understanding among themselves, and between each of them and the firm of Barnets & Whiteside, that in giving said firm the assistance of their signatures they should stand among themselves as co-sureties irrespective of the order in which their signatures were placed on the paper drawn and endorsed for the accommodation of the said firm; that in the pursuance of their agreement and understanding Robert Marshall, James Pottenger, Reuben Pottenger, Thos. Pottenger & Son, B. C. Beall & Co., and David Barnet have interchangeably affixed their signatures to bills of exchange and promissory notes; often given one in renewal of another, in the aggregate representing for at least five
25 years last passed not less than $60,000.00 at any one time, with utter indifference to their relative positions on said paper; that the matter of position on said paper was determined by the firm of Barnets & Whiteside, the above-named persons signing the said paper in whatever order they were requested by the said firm, and that in determining the respective positions on the said paper for the several parties thereto the said firm always regarded them accommodation parties, as co-sureties, and liable among themselves as such. This defendant denies any greater liability thereon than exists against Robert Marshall, and denies that as between themselves they are liable in any other order than as co-sureties.

ISAAC E. CRAIG.

STATE OF OHIO, *ss:*

David Barnet, being sworn, says the matters set forth in his foregoing answer are as he believes true.

DAVID BARNET.

Subscribed in my presence, and sworn to before me, this Nov. 16th, 1874.

C. M. ROHRER, *J. P.*

(Endorsed.) Filed Nov. 16th, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

26 Preble common pleas.

MUNCIE NATIONAL BANK, vs. ROBERT MARSHALL *et al.* } Demurrer.

And now comes the pltff., by Foos & Fisher, its attys., and demurs to the first defense in the answer of David Barnet and Isaac E. Craig, assignees of Barnets and Whiteside, for the following reasons, to wit:

Because the facts stated in said defense are not sufficient in law to constitute a defense to pltff's said action, either in whole or in part.

Wherefore pltff. prays judgment whether he shall other or further reply make.

FOOS & FISHER,
Attys. for Pltff.

(Endorsed.) Filed Nov. 18, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

27 Preble common pleas.

MUNCIE NATIONAL BANK vs. ROBERT MARSHALL *et al.* } Demurrer.

And now comes the pltff., by Foos & Fisher, its attys., and demurs to the second defense contained in the answer of Barnet & Craig, assignees, &c., for reasons, to wit:

That said defense does not state facts sufficient in law to constitute a valid defense to the pltff's action.

Wherefore he prays judgment, &c.

FOOS & FISHER,
Attys. for Pltff.

(Endorsed.) Filed Nov. 18, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

In the court of common pleas.

THE STATE OF OHIO,
Preble County, ss:

MUNCIE NAT. BANK vs. ROBT. MARSHALL *et al.* }

28 November term, A. D. 1874, begun and held November 16, 1874, to wit: November 20, 1874.

This day came the parties, by their attys., and thereupon this cause came on to be heard upon the motion of the pltff. to strike

the second defense contained in the answer of Robert Marshall from the files, for reasons set forth in the motion, and was argued by counsel. On consideration whereof the court does sustain said motion, and said second defense is stricken out, to which ruling of the court the deft. excepted, and his exceptions are entered of record accordingly.

And thereupon the said defendant asked and obtained leave to withdraw the fourth defense, as numbered in said answer, from the files, and the same is accordingly withdrawn.

(Endorsed.) Filed Nov. 20, 1874.

W. D. QUINN, *Cl'k.*

In the court of common pleas.

THE STATE OF OHIO,
Preble County, ss:

MUNCIE NATIONAL BANK OF INDIANA *vs.* ROBERT MARSHALL *et al.* } Nov. term, A.D. 1874, begun and held Nov. 16, viz.: Nov. 20, 1874.

This day came the parties, by their attys., and thereupon this cause came on to be heard upon the demurrer of pltff. to
29 the third defense, contained in the answer of David Barnet and I. E. Craig, assignees, and was argued by counsel, and the court being fully advised in the premises, does sustain said demurrer, to which ruling of the court the defts. excepted, and their exceptions are entered of record accordingly.

And thereupon the defts. asked and obtained leave to file an amended answer, so far as said third defense is concerned.

(Endorsed.) Filed Nov. 20, 1874.

W. D. QUINN, *Cl'k.*
By B. F. LARSH, *Dep't.*

In the court of common pleas.

THE STATE OF OHIO,
Preble County, ss:

MUNCIE NATIONAL BANK *vs.* ROBERT MARSHALL *et al.* } November term, A. D. 1874, begun and held November 16, 1874, viz.: November 27, 1874.

This day came the parties, by their attys., and thereupon this cause came on to be heard upon the motion of plaintiff to strike out the first defense set up in the answer of David Barnet and I. E. Craig, assignees of Barnets & Whiteside, which motion was argued by counsel. On consideration whereof the court do overrule said motion, which ruling of the court in overruling said motion, the plaintiff excepts, and its exceptions are entered
30 of record. And thereupon the plaintiff interposes a general demurrer to said first defense set up in the answer

of said assignees, which demurrer was argued by counsel. On consideration whereof the court overruled said demurrer, to which ruling of the court the plaintiff, by its counsel, excepts, and its exceptions are entered of record.

And thereupon the plaintiff asked and obtained leave to withdraw its reply to the second defense set up in said answer, and interposed a general demurrer to said second defense; and thereupon this cause came on to be heard upon said demurrer, and was argued by counsel. On consideration whereof the court do overrule said demurrer, to which ruling of the court the plaintiff excepted, and his exceptions are entered of record, and pltff. has leave to refile its said reply.

And thereupon this cause came on further to be heard upon the demurrer of plaintiff to the first defense of answer filed herein by Robert Marshall, which was argued by counsel. On consideration whereof the court overrule said demurrer, to which ruling of the court the plaintiff excepts, and its exceptions are entered of record, and pltff. has leave to reply to said defense by 15 Jan., 1875.

Thereupon, by consent of parties, the 4th defense of said answer is stricken out, and the reply thereto withdrawn; and thereupon the deft., David Barnet, withdraws his reply to said Marshall's answer.

(Endorsed.) Filed Nov. 27, 1874.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

31 Preble co. com. pleas.

MUNCIE NATIONAL BANK, Pltff.,
vs.
ROBERT MARSHALL *et al.*, Defts.

Amended Third Defense of David Barnet and Isaac E. Craig, Assignees.

As their amended third defense, and by way of cross-petition, these defendants say that within two years last passed prior to the bringing of this action the firm of Barnets & Whiteside, of which these defendants are now legal representatives, as set forth in the first defense, have paid to and had reserved against them by the plaintiff, which is an institution organized and doing business under the United States statutes of ———, 1866, providing for the organization of and regulating the conduct of national banks, usurious and illegal discounts of $124.00 each on bills of exchange upon which the said firm was the principal debtor, and the proceeds of which were received by the said firm to its own use, each for the sum of $4,000.00, and to run 90 days, upon fifty-one separate and different occasions, as follows, to wit:

1st. March 27th, 1872.
2nd. April 5th, 1872.
3. April 13th, 1872.
4. April 27, 1872.
5. May 8th, 1872.
6. May 18th, 1872.
7. May 25th, 1872.
8. June 3rd, 1872.
9. June 15th, 1872.
10. July 4th, 1872.
32 11. Aug. 13th, 1872.
12. August 19th, 1872.
13. August 27th, 1872.
14. September 7th, 1872.
15. September 18th, 1872.
16. October 1st, 1872.
17. October 25th, 1872.
18. November 11th, 1872.
19. November 19th, 1872.
20. November 25th, 1872.
21. December 6th, 1872.
22. December 18th, 1872.
23. December 30, 1872.
24. January 23rd, 1873.
25. February 7th, 1873.
26. February 18th, 1873.
27. February 24th, 1873.
28. March 6th, 1873.
29. March 31st, 1873.
30. April 24th, 1873.
31. May 6th, 1873.
32. May 10th, 1873.
33. May 20th, 1873.
34. June 4th, 1873.
35. June 17th, 1873.
36. June 28th, 1873.
37. July 25th, 1873.
38. Aug. 9th, 1873.
39. August 19th, 1873.
40. August 26th, 1873.
41. September 4th, 1873.
42. September 15th, 1873.
43. September 27th, 1873.
44. October 24th, 1873.
45. November 8th, 1873.
46. November 26th, 1873.
47. November 18th, 1873.
48. December 5th, 1873.
49. December 15th, 1873.
50. March 18th, 1873.
51. July 27th, 1872.

Amounting in all to the sum of $6,324.00. Each and every one of the aforesaid discounts were illegal, being in excess of the rate allowed to be taken by the plaintiff by the law under which it is organized and doing business, by reason whereof there
33 has accrued to these defendants a right of action against the plaintiff for twice the amount of the interest thus taken, to wit: for the sum of $12,648.00. These defendants say, however, of the said fifty-one discounts, seven, namely, those in the foregoing schedule numbered 6, 12, 19, 26, 33, 39, and 47, are the same as a part of those set forth in the second defense *of these defense* of these defendants, but that the remaining forty-four are separate from and are independent of those shown in said second defense. Wherefore these defendants ask judgment against the plaintiff for $12,648.00, with such other relief as may be equitable.

ISAAC E. CRAIG,
For David Barnet and Isaac E. Craig, Assignees of B. & W.

THE STATE OF OHIO,
Hamilton co., ss:

Isaac E. Craig, being sworn, says that the matters and things

set forth in the foregoing amended defense of the answer of David Barnet & Isaac E. Craig, are, as he verily believes, true.

ISAAC E. CRAIG.

Sworn to and subscribed before me, this 1st day of December, 1874.

[SEAL.] R. B. WILSON,
Notary Public, Hamilton Co., Ohio.

(Endorsed.) Filed Dec. 2d, 1874.

W. D. QUINN, *Clk.*

34 In the court of common pleas, Preble county, O.

THE MUNCIE NATIONAL BANK, Plaintiff,
against
DAVID BARNET *et al.*, Defendants. } Petition.

The Muncie National Bank states that it is a corporation formed for the purpose of carrying on the business of banking, under the act of Congress of the United States of America entitled "An act to provide a national currency," &c., approved June 3d, 1864, and located and doing business at the town of Muncie, in the county of Delaware, and in the State of Indiana. That it is the plaintiff above named, and is a citizen of the State of Indiana within the meaning of the act Congress in such case made and provided. That all the defendants in the above entitled cause are citizens of the State of Ohio, and within the jurisdiction of the circuit court of the United States in and for the southern district of the State of Ohio. That this said suit is pending, and has not been finally tried in this court, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, and that for the reason and on the ground stated in the affidavit attached hereto, marked "A," and by virtue of the provisions of the act of Congress entitled "An act to amend an act entitled an act for the removal of causes in certain cases from the State courts, approved July 27, 1866," approved March 2, 1867, the said
35 the Muncie National Bank prays for the removal of the above entitled suit into the next circuit court of the United States, to be held in the southern district of Ohio, at the city of Cincinnati, according to the provisions of the said act of Congress of the United States, and to this end herewith files its bond, with good and sufficient security, according to law, and for such other and further relief as it may be entitled to in the premises.

HAGANS, BROADWELL & HYMAN, and
FOOS & FISHER,
Attys. for Petitioner.

"*A.*"

Preble common pleas.

THE MUNCIE NATIONAL BANK
vs.
DAVID BARNET *et al.* } Affidavit.

THE STATE OF OHIO,
Hamilton county, ss:

Francis T. White makes oath that he is the president of the Muncie National Bank, the plaintiff named in the foregoing petition; that he has reason to and does believe that from local influence the said Muncie National Bank will not be able to obtain justice in the court of common pleas in and for the county
36 of Preble, Ohio, where the said action above entitled is now pending, and the affiant states that he believes the facts stated in the foregoing petition to be true.

F. T. WHITE.

Affirmed to before me, and subscribed in my presence, this 22d day of January, 1875.

[SEAL.] J. B. MANNING,
Notary Public.

(Endorsed.) Filed January 29, 1875.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

Court of common pleas, Preble county, Ohio.

THE MUNCIE NATIONAL BANK
vs.
DAVID BARNET *et al.* } Bond.

Know all men by these presents that the Muncie National Bank of Muncie, Indiana, by Francis T. White, its president, thereto duly authorized, Peter Smith, and John M. Davis, are held and firmly bound unto James Barnet, Lewis Barnet, William Barnet, & William Whiteside, partners as Barnets & Whiteside; Robert Marshall, David Barnet, and Isaac E. Craig, assignees of
37 Barnet & Whiteside, and David Barnet, in the sum of one thousand dollars, for the payment of which well and truly to be made we bind ourselves jointly and severally, and our and each of our successors, heirs, administrators, and assigns. Sealed with our seals and dated this 28th day of January, 1875. The condition of the above obligation is such that whereas the Muncie National Bank has filed its petition for the removal of the above-entitled suit to the next circuit court of the United States to be held in the southern district of Ohio at Cincinnati, and the court of common pleas in and for the county of Preble, State of

Ohio, where said cause is pending, has granted the said petition and ordered the said suit to be removed accordingly. Now if the Muncie National Bank shall enter in the circuit court of the United States in and for the southern district of Ohio on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts in the premises as by the law in such case is made and provided, then this obligation to be void; otherwise to remain in full force.

[SEAL OF BANK.] THE MUNCIE NATIONAL BANK.
By F. T. WHITE,
Pres.
PETER SMITH.
JOHN M. DAVIS.

Witnesses as to Bank:
WILLIAM LEWIS.
L. B. WILSON.
Witnesses as to—
A. A. UNGER.
JOHN BITZER.

38 (Endorsed.) Filed Jan'y 29, 1875.

W. D. QUINN, *Clk.*
By B. F. LARSH, *Dept.*

Preble common pleas.

THE FIRST NATIONAL BANK OF MUNCIE, IND., *against.* DAVID BARNET *et al.* } Motion to remove case to circuit court U. S. at Cincinnati.

And now comes the above-named pltff., by Foos & Fisher and Hagans, Broadwell & Hyman, its attys., and having first filed the necessary bond and petition required by law, moves the court that this cause be removed for trial to the circuit court of the United States for the southern district of Ohio, in accordance with the act of Congress in such case made and provided.

FOOS & FISHER and
HAGANS, BROADWELL & HYMAN,
Attys. for Pltff.

(Endorsed.) Filed Feb. 22, 1875.

W. D. QUINN, *Clk.*

39 Preble co. com. pleas.

NATIONAL BANK OF MUNCIE, IND., *vs.* ROBT. MARSHALL *et al.*

Now comes David Barnet and Isaac E. Craig, assignees of

Barnet & Whiteside, by their atty., and demur to the petition filed in this cause for its removal to the United States circuit court sitting at Cincinnati, for the reason that the said petition does not state facts sufficient to legally entitle the plaintiff to the said removal.

ISAAC E. CRAIG,
For Assignees.

(Endorsed.) Filed Feb 25, 1875.

W. D. QUINN, *Clk.*

In the court of common pleas.

THE STATE OF OHIO,
Preble County, ss:

MUNCIE NATIONAL BANK OF MUNCIE, IND., *vs.* ROBERT MARSHALL, *et al.* } Feb. Term, A. D. 1875, begun and held Feb. 22, 1875, viz: March 5, 1875.

This day came the parties by their attys., and thereupon this cause came on to be heard upon the demurrer of defts. to
40 the petition filed in this case to remove the same to the circuit court of the United States for the southern district of Ohio, and was argued by counsel, on consideration whereof the court does overrule said demurrer; to which ruling of the court the defts., by their counsel, except, and ask that their exceptions be entered of record accordingly; and thereupon it was ordered by the court that this cause be removed to the circuit court of the United States for the Southern District of Ohio for trial, in accordance with the act of Congress in such case and provided, and the clerk is hereby directed to make certified copies of all process, pleadings, depositions, testimony, &c., now on file in this case.

41 And afterwards, to wit, on the sixth day of October, in the year 1875, came the said plaintiff, by its said attorneys, and by leave of court first had and obtained, filed in the clerk's office of the said circuit court its certain petition in said cause, clothed in the words and figures following, to wit:

In the circuit court of the United States in and for the southern district of Ohio.

THE MUNCIE NATIONAL BANK OF INDIANA, Plaintiff,
against
ROBERT MARSHALL, DAVID BARNET, JAMES BARNET, LEWIS BARNET, WILLIAM BARNET, and WILLIAM WHITESIDE, Partners as BARNET & WHITESIDE, Defendants. } Petition.

The plaintiff above named says that it is a corporation duly incorporated and organized in accordance with the laws of the

United States and the State of Indiana, and doing business of Muncie, in the county of Delaware, in the State of Indiana, at which State it is a citizen within the laws in such case made and provided; that this its action is founded on a bill of exchange, of which the following is a true copy, with all credits and indorsements thereon, viz:

42 $4,000.00. MUNCIE, INDIANA, *Nov.* 18, 1873.

Ninety days after date, of this only bill of exchange pay to the order of Robert Marshall, at the Second National Bank, Cincinnati, four thousand dollars, value received, without any relief from valuation and appraisement laws, and charge to account of yours. The drawers and endorsers dispense with notice of non-acceptance and non-payment of bill, and protest to be evidence of presentments; and if suit be instituted on this bill, the drawer, indorsers, and acceptors promise to pay 5 per cent. attorney's fees, and the costs and charges for the collection thereof, with ten per cent. interest after maturity until paid for value received.

DAVID BARNET.

To Barnet & Whiteside, Camden, Ohio.
Endorsed: Robert Marshall.
Barnets & Whiteside written across face of note.

That there are no credits on said bill of exchange; that the defendant, David Barnet, is liable thereon as drawer; and the defendants, James Barnet, Lewis Barnet, William Barnet, and William Whiteside, partners as Barnet & Whiteside, are liable thereon as acceptors, and the defendant, Robert Marshall, is liable thereon as endorser; that on or about the 18th day of November, 1873, the said defendants, Barnet & Whiteside, accepted said bill, and on or about the 18th day of November, 1873, the defendant, Robert Marshall, endorsed the same and delivered it to the plaintiff for value; that when said bill became due, no part of it was paid, although then duly presented to the said Barnet & Whiteside for payment at the counter of the Second
43 National Bank of Cincinnati, and payment then and there demanded, which was refused, and said bill was duly protested, of all which the said Robert Marshall and David Barnet had due notice.

The plaintiff further says that said bill was drawn, endorsed, and delivered to it in the State of Indiana; that by the laws of that State in full force at the time said bill was so drawn, endorsed, and delivered, it was lawful for the drawer and acceptors thereof to stipulate in writing therein for the payment of any rate of interest not exceeding ten per cent.; and it was also lawful at the said time by the laws of the said State of Indiana, then in full force, for the drawer and acceptors of the said bill to stipulate in the same, in writing, with the payer or endorser thereof,

that in case said bill had to be collected by law the said drawer and acceptors and endorsers would pay the amount of the attorney's fees for the collection thereof as stated therein.

The plaintiff finally says that there is due to it from the defendants, on said bill, the sum of four thousand dollars, which it claims with interest thereon at the rate of ten per cent. from the 19th day of February, 1874, and for which with one 28-100 dollars, costs of protest, and five per cent. on the said four thousand dollars and interest as aforesaid, for attorneys' fees for collection and for costs, it prays judgment and such other and further relief as it may be entitled to in the premises.

HAGANS & BROADWELL,
For Plf.

44 THE STATE OF OHIO,
Southern District, ss:

Marcellus B. Hagans makes oath that he believes the facts stated in the foregoing petition to be true; that he is the attorney . . . . . of the Muncie National Bank of Indiana, and that it is a foreign corporation.

M. B. HAGANS.

Sworn to before me and subscribed in my presence, this 5th day of October, 1875.

[SEAL.] EDW. A. ROBINSON,
Notary Public, Ham. Co., O.

And afterwards, to wit, on the third day of November, in the year of our Lord one thousand eight hundred and seventy-five, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.* } No. 2053.—Money.

Rule to Answer.

On motion of plaintiff's attorney, the defendants are
45 ruled to answer herein within ten days.

And thereupon afterwards, to wit, on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-five, came the said Barnet and Craig, assignees, by their attorneys, and, by leave of the court first had and obtained, filed in the clerk's office of the court aforesaid their certain answer in said cause, clothed in the words and figures following, to wit:

U. S. circuit court, S. D. O.

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*

Separate Answer and Cross-petition of David Barnet and Isaac E. Craig, Assignees of Barnets & Whiteside.

Now come the defendants, David Barnet and Isaac E. Craig, assignees, and for their separate answer and cross-petition herein say: That by a certain deed of assignment made for the benefit of creditors, and to them executed and delivered by James Barnet, William Barnet, Lewis Barnet and William Whiteside, on the 27th day of December, A. D. 1873, and proceedings relative thereto in the probate court of Preble county, Ohio, they became duly qualified as the assignees of the said grantors, and entered on the execution of the said trust on or about the ——— day of January, 1874. Prior to the time of making the said assignment the defendant herein, who composed the firm of Barnets & Whiteside, and who made the assignment as above stated,
46 had been ever since the 11th of January, 1866, borrowers of large amounts of money from the plaintiff, for which the exorbitant and illegal interest taken by the plaintiff contributed in no small degree to the final ruin and insolvency of the said firm; that the indebtedness of the said firm to the plaintiff has been unbroken and continuous since April the 8th, 1866; has since then been at no time less than $4,000.00, reached at one time $36,000.00, and was at the date of the said assignment $28,000.00 upon bills of exchange representing this indebtedness, the plaintiff has taken by way of illegal discounts, somewhat in excess of the sum of $15,000.00, of which said sum, not less than $5,000.00 was in excess of legal rates; that for the purpose of evading and defeating the operation of the laws against usury the plaintiff has kept this indebtedness represented by a number of different bills, at the same time requiring of their said debtors a renewal and discount of each every ninety days. That, by this requirement of renewal, the said bills became arranged into a number of different sets or series, consisting each of some certain bill, and those taken in renewals thereof; that as one of the means adopted by the plaintiff to execute its purpose of evading the law, each of these series was nominally brought to an end by the refusal of the plaintiff to further renew a bill of that series, but at the same time loaning money on another bill which became the foundation of a new series, which sum thus loaned was required by the plaintiff to be appropriated by the defendants named to the payment of the old. These defendants, however, aver that it was all in fact but one debt, and that any and all appearance of inde-

pendence of its different parts is fictitious and unreal; that the plaintiff has received payment and satisfaction of the en-
47 tire indebtedness of the said firm to it, except so far as evidenced by the bill on which this suit is brought. For which foregoing reason these defendants aver that there is nothing owing from the defendants to the plaintiff.

2d. For further defense these defendants say that on or about the 21st day of November, 1871, the plaintiff discounted for the firm of Barnets & Whiteside a bill of exchange of said date, drawn for $4,000.00 to run 90 days, that the plaintiff paid for the said bill but $3,876.00, reserving to itself as a discount charge $124.00, which said bill has since then, at intervals of about 90 days each, been eight times renewed as follows, to wit:

1st. February 20th, 1872.	5th. February 18th, 1873.
2d. May 18th, 1872.	6th. May 20th, 1873.
3d. August 19th, 1872.	7th. August 19th, 1873.
4th. November 19th, 1872.	8th. November 18th, 1873.

Which last-named renewal is the bill set forth in the petition. On each of the said renewals the same discount was charged and paid as was reserved on the original bill, making as the entire discount on the series $1,116.00, which these defendants say should, even if their other defenses are disallowed, be applied as a payment on the principal sum.

3d. For further defense, and by way of cross-petition, these defendants say that within the two years last passed, prior to the bringing of this action, the firm of Barnets & Whiteside, of which these defendants are now the legal representatives, as set forth in the first defense, have paid to and had reserved against them by the plaintiff, which is an institution organized and
48 doing business under a statute of the United States, passed . . . . 1866, providing for the organization and regulating the conduct of national banks, usurious and illegal discounts of $124.00, on bills of exchange drawn for $4,000.00, to run 90 days, on which the said firm was principal debtor, and the proceeds of which were received by the said firm to its own use on fifty-one separate and different occasions as follows, to wit:

1st. March 27th, 1872.	26th. February 18th, 1873.
2d. April 5th, 1872.	27th. February 24th, 1873.
3d. April 13th, 1872.	28th. March 6th, 1873.
4th. April 27th, 1872.	29th. March 31st, 1873.
5th. May 8th, 1872.	30th. April 24th, 1873.
6th. May 18th, 1872.	31st. May 6th, 1873.
7th. May 25th, 1872.	32d. May 10th, 1873.
8th. June 5th, 1872.	33d. May 20th, 1873.
9th. June 15th, 1872.	34th. June 4th, 1873.
10th. July 4th, 1872.	35th. June 17th, 1873.

11th. Aug. 13th, 1872.
12th. August 19th, 1872.
13th. August 27th, 1872.
49 14th. September 7th, 1872.
15th. September 18th, 1872.
16th. October 1st, 1872.
17th. October 25th, 1872.
18th. November 11th, 1872.
19th. November 19th, 1872.
20th. November 25th, 1872.
21st. December 6th, 1872.
22nd. December 18th, 1872.
23d. December 31st, 1872.
24th. January 23d, 1873.
25th. February 7th, 1873.
36th. June 28th, 1873.
37th. July 25th, 1873.
38th. August 9th, 1873.
39th. August 19th, 1873.
40th. August 26th, 1873.
41st. September 4th, 1873.
42d. September 15th, 1873.
43d. September 27th, 1873.
44th. October 24th, 1874.
45th. November 8th, 1873.
46th. Nov. 26th, 1873.
47th. November 18th, 1873.
48th. December 5th, 1873.
49th. December 15th, 1873.
50th. March 18th, 1873.
51st. July 27th, 1873.

In the aggregate amounting to the sum of $6,324.00. Each and every one of the aforesaid discounts were illegal, being in excess of the rate allowed to be taken by the plaintiff by the law under which it was organized and does business. By reason whereof there has accrued to these defendants a right of action against the plaintiff for twice the amount of the interest thus taken, to wit: for the sum of $12,648.00. These defendants say, however, that of the said fifty-one discounts seven, namely, those in the foregoing schedule numbered 6, 12, 19, 26, 33, 39, and 47, are the same as a part of those set forth in their second defense, but that the remaining forty-four are separate from and independent of those shown in said second defense. Wherefore these defendants ask judgment against the plaintiff for $12,648.00 and all other proper relief.

R. B. WILSON & I. E. CRAIG,
For David Barnet & I. E. Craig.

50 STATE OF OHIO,
——— *County, ss:*

Isaac E. Craig, being sworn, says that the matters and things set forth in the foregoing answer are as he verily belives true.

ISAAC E. CRAIG.

Sworn to and subscribed before me, this 11th day of Nov., 1875.

[SEAL.] J. M. SHEAFER,
Notary Public.

And afterwards, to wit, but on the same day and year last aforesaid, came the said Robert Marshall, by Campbell & Gilmore and Miller & Harris, his attorneys, by leave of court first had and obtained, filed in the clerk's office of the court aforesaid his

certain answer and cross-petition, clothed in the words and figures following, to wit.:

United States circuit court, southern district of Ohio.

THE MUNCIE NATIONAL BANK OF INDIANA, Plaintiff,
against.
ROBERT MARSHALL *et al.*, Dets.

The defendant, Robert Marshall, now comes, and for his separate answer to the petition of plaintiff, and by way of cross-petition, says for his first answer:

1. That on or about the 18th day of May, 1872, the de-
51 fendant, David Barnet, drew a bill of exchange upon said Barnets & Whiteside in favor of this defendant (for the accommodation of said Barnets & Whiteside) for the sum of $4,000, payable at 90 days at the Second National Bank of Cincinnati, Ohio, which said bill was endorsed by this defendant, (for the accommodation of said Barnets & Whiteside, and without consideration,) accepted by said Barnets & Whiteside, and was by them presented to plaintiff about the date named in the petition for discount, and the said plaintiff with a full knowledge of all the facts advanced and loaned to said Barnets & Whiteside on said bill of exchange the sum of $3,976, and no more, reserving as interest and exchange thereon the sum of $124.00.

2. This defendant further says, that said original bill of exchange, with the same drawer, endorser, and acceptor, has been renewed from time to time, as follows:

On or about the 18th day of August, 1872.
On or about the 18th day of Nov., 1872.
On or about the 18th day of February, 1873.
On or about the 18th day of May, 1873.
On or about the 18th day of August 1873.

And on or about the 18th day of Nov. 1873, which last renewal bill, is the foundation for this suit, and all of which said renewals were within two years next preceding the filing of the original petition in this case, filed in the court of common pleas of Preble county, Ohio, on March 16, 1874, which suit was trans-
52 ferred to this court on motion of plaintiff. This defendant avers that upon each renewal of said bill at the times named, the said plaintiffs received from said Barnets & Whiteside the sum of $124.00, as interest and exchange upon the bill given in renewal of its predecessor, making in all the sum of $868.00 paid by said Barnets & Whiteside to plaintiff as interest and exchange, on said original loan of $3,876, which sums so charged were usurious, and were at a greater rate of interest [allowing exchange] than plaintiff was authorized to reserve, take, or charge, by the laws of the United States, or by the laws of the State of Indiana, where said Muncie Bank is and was located,

all of which was well known to plaintiff at the several times named; whereby plaintiff forfeited said sum of $868, so paid as interest and exchange, and said Barnets & Whiteside are entitled to have double the amount so paid, to wit: the sum of $1,736.00 applied in reduction of the principal of said original loan of $3,876, leaving the amount due upon said bill (subject to the matters hereinafter stated) $2,140 only, and which sum is all that plaintiff is entitled to recover from any of the parties to said bill in any event.

II. For a second defense, this defendant adopts the averments of his first defense, in reference to the relation of the several parties named, to said bill, and says: that within two years next preceding the commencement of this suit in the court of common pleas of Preble county, Ohio,, the defendants, Barnets & Whiteside, have paid to and had reserved against them by the plaintiff (which is an institution organized and doing busines in the State of Indiana, under the United States statute of
53 . . . . . 1866, providing for the organization of, and regulating the conduct of national banks,) usurious and illegal discounts of $124 each on bills of exchange, upon which said Barnets & Whiteside were the principal debtors, and the proceeds of which were received by said firm to its own use, each for the sum of $4,000.00, and to run 90 days, upon 51 separate and different occasons, as follows:

1. Mch 27, 1872. 2. April 5, 1872. 3. April 13, 1872. 4. April 27, 1872. 5. May 8, 1872. 6. May 18, 1872. 7. May 25, 1872. 8. June 5, 1872. 9. June 15, 1872. 10. July 4, 1872. 11. Aug. 13, 1872. 12. Aug. 19, 1872. 13. Aug. 27, 1872. 14. Sept. 7, 1872. 15. Sept. 18, '72. 16. Oct. 1, '72. 17. Oct. 25, '72. 18. Nov. 11, '72. 19. Nov. 19, '72. 20. Nov. 25, '72. 21. Dec. 6, 1872. 22. Dec. 18, '72. 23. Dec. 31, '72. 24. Jan. 23, 1873. 25. Feb. 7, '73. 26. Feb. 18, '73. 27. Feb. 24, '73. 28. Mch 6, '73. 29. Mch 31, '73. 30. Apl 24, '73. 31. Mch 6, '73. 32. May 10, '73. 33. Mch 20, '73. 34. June 4, 1873. 35. June 17, '73. 36. June 28, '73. 37. July 25, 1873. 38. Aug. 9, '73. 39. Aug. 19, '73. 40. Aug. 26, '73. 41. Sept. 4, 1873. 42. Sept. 15, '73. 43. Sept. 27, '73. 44. Oct. 24, '73. 45. Nov. 8, '73. 46. Nov. 26, '73. 47. Nov. 18, '73. 48. Dec. 5, 1873. 49. Dec. 15, '73. 50. Mch 18, '73. 51. July 27, 1872.

Amounting in all to the sum of $6,324. Each and every one of the aforesaid discounts were illegal, being in excess of the rate allowed to be taken by the plaintiff by the law under which it is organized and doing business. By reason whereof there has accrued to said Barnets & Whiteside a right of action against
54 the plaintiff to recover double the amount of interest thus taken, to wit, for the sum of $12,648.00; and this defendant being the accommodation endorser for said Barnets & White-

side, is entitled to be subrogated to the rights of said Barnets & Whiteside, and to ask that so much of said usurious interest, so paid and reserved, as may be necessary to liquidate any amount that may be found due upon the bill described in the petition, may be so applied.

For a third defense, this defendant says:

That Barnets & Whiteside are the principals on the bill described in the petition and on the several bills of its series mentioned in his first defense, and are primarily liable thereon. That David Barnet, defendant, became a party to said bill as drawer of said bill, before this defendant became a party thereto as endorser, and that this defendant is only liable, if at all, in the event that the plaintiff fails to make the amount found due thereon out of the property of Barnets & Whiteside and David Barnet.

For a fourth defense, this defendant says: He denies that he delivered said bill of exchange to plaintiff. He denies that said bill was endorsed by him in the State of Indiana, but avers that he endorsed the same in Preble co., Ohio, where the same was drawn, and where he resides. He denies the right of pltff to demand or recover attorneys' fees. This defendant prays that he may be subrogated to the rights accruing to his principals, by reason of the facts stated in his first and second defenses, so far as the same may be necessary to liquidate any amount that may be found due upon the bill described in the petition.

55 That if any sum is found due as against the parties to said bill, then that the order in which the parties thereto are liable may be fixed as claimed in his 4th defense, and for all proper relief in the premises.

CAMPBELL & GILMORE,
MILLER & HARRIS,
Attys. for R. Marshall.

THE STATE OF OHIO,
Preble County, ss:

Robert Marshal, defendant, being duly sworn, says that he believes the statements of the foregoing answer and cross-petition to be true.

ROBT. MARSHALL.

Subscribed and sworn to before me, this Nov. 11, 1875.
Witness my hand and seal the day above written.

[SEAL.]

J. W. KING,
Probate Judge, Preble Co., O.

And afterwards, to wit, on the twentieth day of November, in the year aforesaid, came David Barnet, by his said attorneys,

and, by leave of court first had and obtained, filed in the
56 clerk's office of the court aforesaid, his separate answer to the cross-petition of Robert Marshall, herein filed, clothed in the words and figures following, to wit:

Circuit court of the United States, S. D. O.

MUNCIE NATL. BANK *vs.* ROBT. MARSHALL *et al.* } Answer of David Barnet to Robt. Marshall.

Now comes David Barnet, and for his answer to the cross-petition of Robert Marshall says he denies that he is liable on the bill of exchange set forth in the plaintiff's petition in any other manner than as a co-surety with the other accommodation parties thereto; that the firm of Barnets & Whiteside is the principal debtor thereon, and that the other obligors on the said bill, including this defendant, are but accommodation parties.

This defendant further says that at the time of the drawing, accepting, endorsement, and delivery to the plaintiffs of the said bill, there was an understanding among all the parties to the said bill, that the accommodation parties thereto were liable between themselves as co-sureties thereon; that the said firm had been a large borrower of money for a number of years, and the parties hereto who were accommodation parties on the bill were also sureties for the said firm on many other similar bills of exchange; that the position on all of the said bills of the names of the said sureties was a matter wholly determined by the said firm, and that the said sureties affixed their signatures,
57 in whatever order and position they were by the said firm requested; that their relative positions on the said bills were often interchangeable, and that in the renewal of a bill no respect was paid to preservation of the order observed in the original; that the bill on which this suit is brought was one of a a number of renewals of a bill given many months prior to the date of that set forth in the petition.

WILSON & CRAIG,
For David Barnet.

STATE OF OHIO,
Preble County, ss:

David Barnet, being sworn, says that the matters and things set forth in the foregoing answer are as he verily believes true.

DAVID BARNET.

Sworn to and subscribed before me, a notary public, this 20th day of November, A. D. 1875.

[SEAL.]

C. M. ROHRER,
Notary Public, P. Co., O.

And afterwards, to wit, on the thirteenth day of December, in the year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

58 MUNCIE NATIONAL BANK *vs.* ROBERT MARSHALL *et al.* } No. 2053. Chancery.

Default set aside.

On motion to the court it is ordered that the default herein be, and the same is hereby, set aside, and the plaintiff has leave to file its separate demurrer to the answer and cross-petition of Barnet and Craig, assignees, and to the answer of Robert Marshall herein forthwith, and the same is accordingly filed.

Which said demurrer is in the words and figures following, to wit:

In the circuit court of the United States, southern district of Ohio.

THE MUNCIE NATIONAL BANK *vs.* ROBERT MARSHAL *et al.* } No. 2053.

And now comes the Muncie National Bank, by Hagans & Broadwell, its attorneys, and demurs to the answer and cross-petition of Barnets & Craig, assignees, &c., because it says they have not legal capacity to make the defense and to sue the plaintiff.

HAGANS & BROADWELL,
For Pltff.

59 And afterwards, but on the same day and year last aforesaid, came the plaintiff, by its said attorneys, and by leave of the court first had and obtained, filed in the clerk's office of the court aforesaid its certain demurrer to the answer of Robert Marshall herein, which said demurrer is in the words and figures following, to-wit:

In the circuit court of the United States, southern district of Ohio.

THE MUNCIE NATIONAL BANK *vs.* ROBERT MARSHALL, &c. } No. 2053.

1. And now comes the plaintiff, by Hagans & Broadwell, its attorneys, and demurs to the first defense, the second defense, the third defense, and the fourth defense of the answer of Robert Marshall, because it says the same and each of them do not contain facts sufficient to constitute a defense.

HAGANS & BROADWELL,
For Pltff.

60 And afterwards, to wit, on the ninth day of February, in the year of our Lord one thousand eight hundred and

seventy-six, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
No. 2053. Money.

Leave to reply.

On motion to the court it is ordered that the default herein be, and the same is hereby, set aside, and plaintiff has leave to file a reply to the answer of D. Barnett herein forthwith, and the same is accordingly filed.

Which said reply is in the words and figures following, to wit:

THE MUNCIE NATIONAL BANK OF INDIANA, Plffs,
vs.
ROBERT MARSHALL *et al.*
Reply.

U. S. circuit court, southern district of Ohio.

And now comes the said Robert Marshall, one of said defendants, and for reply to the answer of said David Barnett to the cross-petition of this defendant says he denies that at the time of drawing, accepting, or indorsing of said bill of exchange, or of its delivery to the said plaintiffs, there was any understanding or agreement among all of the parties to the said bill that the
61 accommodation parties thereto were liable between themselves as co-sureties thereon. This defendant never agreed or was a party to any such agreement or understanding with said David Barnet or any of the other accommodation parties to said bill of exchange to stand liable as a co-surety with said David Barnet or either of said other accommodation parties thereto, either before, at the time of, or since the drawing, indorsing, accepting, or delivering of said bill of exchange, but stands upon his rights as an indorser of said bill after the same had been so drawn and signed as drawer by the said David Barnett.

ROBERT MILLER & CAMPBELL & GILMORE,
Attys. for said Defendant.

THE STATE OF OHIO,
Preble County, ss:

Robert Marshall, being duly sworn, says the facts set forth in his foregoing reply are, as he verily believes, true.

ROBERT MARSHALL.

Sworn to before me, and signed in my presence, this 5th day of February, 1876.

JNO. R. STEPHEN, *J. P.*

And afterwards, to wit: On the twenty-first day of March, in the year last aforesaid, a further entry was made
62 upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
} No. 2053. Money.

Demurrer sustained.

This day this cause came on to be heard upon the demurrer of the plaintiff to the answer and cross-petition of Barnett and Craig, assignees, and was argued by counsel; on consideration whereof the court doth sustain the said demurrer to the first and third defenses. It is therefore considered by the court that the plaintiff recover of the said Barnett and Craig, assignees, its costs in this behalf expended. And the court overrules the demurrer to the second defense, and the plaintiff has leave to reply within five days.

Which said reply is in the words and figures following to wit:

In the circuit court of the United States, in and for the southern district [of] Ohio.

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
} No. 2053.

The plaintiff, for reply to the second defense of Barnet and Craig, assignees, by leave of court, says:

That it may be true that the series of discounts with the plaintiff may have been had by the said by the said Barnets &
63 Whitesides, and the amounts therein stated may have been reserved by way of interest and exchange and charges in the said several transactions, but this plaintiff denies that if the defendant is entitled to the benefit of any forfeiture whatever under the national banking act, it is only upon the transactions in which the bill sued on was discounted, and none other.

And this plaintiff avers that no usurious interest was reserved by it on the bill sued on at the time the same was discounted; that by the laws of the State of Indiana, in force at the time said discount was made, the legal rate of interest allowed by the law thereof was ten per centum per annum, at which rate the plaintiff was entitled to discount the said bill sued on; that in addition thereto the plaintiff charged the said Barnets & Whitesides 1-4 of one per cent. for a sight draft, (being the then current rate of exchange,) which they then and there purchased of the plaintiff upon the city of Cincinnati, O., which sight draft was payable there, and the plaintiff deducted the said premium of exchange

out of the proceeds of said bill, when discounted, all of which by law the plaintiff had a right to do; and in addition thereto, the plaintiff charged the said Barnets & Whitesides 1-4 of one per cent. for collecting the said bill, which was the custom of all banks in such transactions, and deducted the same from the proceeds of said bill when discounted, as by law they had a right to do; and so the plaintiff says there was and is no usury in the said transaction, and denies that it took, received, reserved or charged a rate of interest greater than allowed by law.

Wherefore the plaintiff demands judgment as prayed in
64 the petition, and such other and further relief as it may be entitled to in the premises.

HAGANS & BROADWELL,
For Pltff.

Waive jurat.

WILSON & CRAIG.

And afterwards, but on the same day and year aforesaid, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
} No. 2053.—Money.

Demurrer Overruled.

This day this cause came on to be heard upon the demurrers of the plaintiff to the first, second, third and fourth defenses in the answer of the said Marshal contained, and was argued by counsel. On consideration whereof, the court doth overrule the said demurrers to the first, third and fourth defenses aforesaid, and has leave to reply thereto within five days. And the court doth sustain the said demurrer to the second defense, and it is considered by the court that the plaintiff recover of the said Robert Marshal its costs in that behalf expended; which said reply is in the words and figures following, to wit:

65 In the circuit court of the United States for the Southern district of Ohio.

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
} No. 2053.

1. The plaintiff, for reply to the first defense in the answer of Robert Marshall, by leave of court, says:

That it may be true that the series of discounts with the plaintiff may have been had by the said Barnets & Whitesides, and the amounts therein stated may have been reserved by way of interest on the said several transactions, but this plaintiff denies

that if the defendant is entitled to the benefit of any forfeiture whatever under the national banking act, it is only upon the transaction in which the bill sued on was discounted, and none other.

And this plaintiff avers that no usurious interest was reserved by it on the bill sued on at the time the same was discounted; that by the laws of the State of Indiana, in force at the time said discount was made, the legal rate of interest allowed by the laws thereof was ten per centum per annum, at which rate the plaintiff was entitled to discount the said bill sued on; that, in addition thereto, the plaintiff charged the said Barnets & Whiteside one-fourth of one per cent. for a sight draft, (being the current rate of exchange,) which they then and there purchased of the plaintiff upon the city of Cincinnati, O., which sight draft was payable there, and the plaintiff deducted the said premium of ex-
66 change out of the proceeds of said bill when discounted, and which by law they had a right to do; and in addition thereto, the plaintiff charged the said Barnets & Whiteside one-fourth of one per cent. for collecting the said bill, which was the custom of all banks in such transactions, and deducted the same from the proceeds of the said bill when discounted, as by law they had a right to do; and so the plaintiff says there was and is no usury in said transaction, and denies that it took, received, reserved, or charged a rate of interest greater than allowed by law.

Wherefore the plaintiff demands judgment as it the said petition demanded.

2. And for reply to the third defense the plaintiff says: that she denies that said Marshall is liable on the said bill only in the event that it fails to make the amount found to be due thereon out of the property of Barnets & Whiteside and David Barnet.

Wherefore, it demands payment as in the petition demanded.

3. And for reply to the fourth defense the plaintiff says: that it is true said Marshall delivered the said bill to the plaintiff; that said bill was endorsed by him in the State of Indiana, and not in Preble county, Ohio.

And the plaintiff avers, that by the laws of the State of Indiana, where said note was discounted, the contract for attorneys' fees in the said bill contained was legal at the time, and said Marshall is liable thereon for the same.

Wherefore the plaintiff demands judgment as in the petition demanded.

HAGANS & BROADWELL,
For Plaintiff.

67 THE STATE OF OHIO,
Hamilton County, Southern District of Ohio, ss:

Marcellus B. Hagan makes oath that he is the agent and

attorney of the plaintiff, and that he believes the facts stated in the foregoing reply to be true.

M. B. HAGANS.

Sworn to before me and subscribed in my presence, this 20th day of March, 1876.

[SEAL.] EDW. A. ROBINSON,
Notary Public, Ham. Co., O.

68 And afterwards, to wit: on the seventh day of April, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.* } No. 2053. Money.

Motion overruled.

This day this case came on for hearing upon the motion to strike from the reply redundant matter, and was argued by counsel, and submitted. On consideration whereof the court overrules said motion.

And afterwards, but on the same day and year last-aforesaid, came Robert Marshall, by his said attorneys, and filed in the clerk's office of the court aforesaid, his certain demurrer to the reply of the plaintiff herein filed, which said demurrer is clothed in the words and figures following, to wit:

In the circuit court of the United States, for the southern district of Ohio.

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL AND OTHERS. } No. 2053.

69 And now comes the said Robert Marshall and demurs to the reply of said plaintiff to the first defense in the answer of said defendant, and for cause of demurrer thereto, states the following:

1. The said reply does not state facts sufficient to constitute a reply to said first defense in said answer.

ROBERT MILLER, & CAMPBELL & GILMORE,
Att'ys for Plaintiff.

And afterwards, but on the same day and year last-aforesaid, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.* } No. 2053. Money.

Demurrer overruled.

This day this case came on for hearing on the demurrer of Robert Marshall, to the reply of the plaintiff to the first defense in the answer of said defendant, and was argued by counsel and submitted. On consideration whereof the court finds said demurrer not to be well taken, and overrules the same.

70 And afterwards, but on the same day and year last aforesaid, a further entry was made upon the journal of said Court in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.* } No. 2053. Money. Leave to amend answer.

On motion to the Court, it is ordered that Barnett & Craig, assignees, have leave to file an amended answer herein forthwith, and the same is accordingly filed. Which said amended answer is in the words and figures following, to wit:

Circuit Court of U. S., S. D. O.

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*

Now come the defendants, Davis Barnet and Isaac Craig, assignees, and for their separate answer say that, by a certain deed of assignment, made for the benefit of creditors and to them executed and delivered by James Barnet, William Barnet, Lewis Barnet, and William Whiteside, who composed the firm of "Barnets & Whiteside," on the 27th of Dec., 1873, and proceedings relative thereto in the Probate Court of Preble Co., Ohio, they became duly qualified as the assignees of the said grantors.

71 That on or about the 21st day of Nov., 1871, the plaintiff discounted for the firm of Barnets & Whiteside, a bill of exchange drawn for $4,000, to run ninety days; that the plaintiff paid for said bill but $3,876, reserving to itself, as a discount charge, $124; which said bill has since then, at intervals of about ninety days each, been eight times renewed, as follows, to wit:

1. February 20, 1872.
2. May 18, 1872.
3. August 19, 1872.
4. November 19, 1872.
5. February 18, 1873.
6. May 20, 1873.
7. August 19, 1873.
8. November 18, 1873.

Which said last-named renewal is the bill set forth in the petition. On each of these renewals the same discount, to wit, $124, was charged and paid, and each of which said discounts was illegal and usurious in its character, making as the entire discounts on said series, $1,116.

These defendants further say that each of said bills of exchange was made up by the friends of the said firm as accommodation parties thereto, with the said firm also as a party; that until purchased by the plaintiffs, the said bills represented one actual indebtedness; and that of the accommodation character of the said bills the plaintiffs were well aware. And the transactions above set forth were in fact only a loan of money from the
72 plaintiffs to Barnets and Whiteside, and were at the time so understood and intended by the plaintiff.

Wherefore these defendants say that the said sum of $1,116.00 should be applied as a payment on the bill set forth in the petition, and that the said usurious discounts are all forfeited to the defendants by reason of their usurious and illegal character.

WILSON & CRAIG,
For Barnet & Craig.

And afterwards, to wit, but on the same day and year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

MUNCIE NATIONAL BANK
vs.
ROBERT MARSHALL *et al.*
No. 2053. Money.

Jury sworn.

This day came the parties by their attorneys, and thereupon, a jury being called, came, to wit: Thomas C. Downey, John Eckman, Horace G. Ford, B. F. Hitch, E. C. Jackson, Charles P. Lloyd, John P. Loge, H. B. Mattox, Henry Payne, Samuel Rice, Daniel Turner, and Luther Thompson, who were duly empanelled and sworn well and truly to try the issue joined between the parties; and the evidence being finished, but counsel not having concluded their arguments, the court adjourned the jury until nine o'clock to-morrow morning, to which time this case is continued.

73 And afterwards, to wit, on the eighth day of April, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following to wit:

THE MUNCIE NATIONAL BANK
vs.
ROBERT MARSHAL, *et al.*
No. 2053.—Money.

Verdict.

This day came again the parties by their attorneys, and also

the jurors heretofore empanelled and sworn herein, and having heard the evidence, the argument of counsel, and the charge of the court, upon their oaths do find the issue to be in favor of the plaintiff, and do assess the damages of said plaintiff by reason of the premises at four thousand and eighty dollars and thirty-one cents, and do further find that there was no contract between the sureties as to their respective liability. Whereupon the said parties plaintiff and defendants give notice of a motion for a new trial.

And afterwards, to wit, on the sixteenth day of May, in the year last aforesaid, came the defendants, David Barnett and Isaac I. Craig, assignees, &c., and filed in the clerk's office of the court aforesaid their certain error bond in said cause, clothed in the words and figures following, to wit:

74 Supreme Court of the United States.

DAVID BARNET AND ISAAC E. CRAIG, Assignees of BARNETTS & WHITESIDES, Plaintiffs,
vs.
THE MUNCIE NATIONAL BANK, Defendant.
} In error.

Know all men by these presents, that we, David Barnett and Isaac I. Craig, assignees, &c., William Shaffer and G. Y. Roots, are held and firmly bound unto the Muncie National Bank in the sum of two hundred dollars, to be paid to the said the Muncie National Bank, its successors and assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated this thirteenth day of May, A. D. one thousand eight hundred and seventy-six.

Whereas the above named David Barnett and Isaac E. Craig, assignees, &c., have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the circuit court of the United States within and for the sixth judicial district and the southern district of Ohio.

Now, therefore, the condition of this obligation is such that if the above named David Barnett and Isaac I. Craig, assignees, &c., shall prosecute their said writ of error to effect and
75 answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DAVID BARNET, [SEAL.]
ISAAC E. CRAIG, [SEAL.]
Assignee of Barnets & Whiteside.
WM. SHAFFER, [SEAL.]
G. Y. ROOTS, [SEAL.]

Sealed and delivered in presence of within signatures of David Barnet and G. Y. Roots by A. E. Smith.

And afterwards, to wit, on the fifteenth day of June, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Judgment.

THE MUNCIE NATIONAL BANK OF INDIANA
vs.
BARNETS AND WHITESIDE *et als.*
} No. 2053.—Money.

This day this cause came on to be heard upon the motions of the plaintiff and of Robert Marshall for a new trial. On consideration whereof the court doth overrule both said motions, to which the parties respectively except. And, thereupon, the court coming to render judgment on the verdict of the jury doth adjudge that the plaintiff recover of the defendants the sum of four thousand and eighty dollars and thirty-one cents, and interest from the eighth day of April, 1876, and their cost by
76 them in this behalf expended, and execution is awarded therefor. And it is hereby certified that Barnetts & Whitesides are the principal debtors, and David Barnet and Robert Marshall are sureties. And it is therefore ordered that the clerk of this court issue an execution commanding the marshal to cause the money aforesaid to be made of the goods and chattels, lands and tenements of the principal debtors; but for want of sufficient property to make the same of them, that he cause the same to be made of the goods and chattels, lands, and tenements of David Barnet and Robert Marshall, in the order there named. And it is further ordered that Barnetts & Craig, assignees of Barnetts & Whitesides, allow the account of the said judgment against the estate in their hands, and pay the dividends thereon.

77 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the Muncie National Bank of Muncie, Indiana, is plaintiff, and Robert Marshall *et al.*, are defendants, as the same remain in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this nineteenth day of April, A. D. 1878, and in the one hundred and second year of the Independence of the United States of America.

[SEAL.]

Attest: THOS. AMBROSE,
6 *Clerk U. S. Circuit Court, S. D. O.*

78 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you, between David Barnet and Isaac E. Craig, assignees of Barnets and Whiteside, plaintiffs, and the Muncie National Bank of Muncie, Indiana, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the second Monday in the month of October next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

80 Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the [SEAL.] Independence of the United States of America the 102d.

Attest: THOS. AMBROSE,
Clerk U. S. C. C., S. D. O.

81 UNITED STATES OF AMERICA, *ss:*

To the Muncie National Bank, of Muncie, Indiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, wherein David Barnet & Isaac E. Craig, assignee of Barnets & Whiteside, are plaintiffs, and you, the Muncie National Bank, of Muncie, Indiana, are defendants in error, to show cause, if any there be, why the judgment in said writ of

error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourth day of March, in the year of our Lord [SEAL.] one thousand eight hundred and seventy-eight, and in the 102nd year of the Independence of the United States of America.

PHILIP B. SCHWING,
District Judge, holding the Circuit Court of the United States, for the Southern District of Ohio.

I hereby acknowledge service of the foregoing citation for the Muncie National Bank, of Muncie, Indiana, the defendants in error.

Cincinnati, March 6, 1878.

HAGANS & BROADWELL,
Att'ys for Defendant in Error.

82 Supreme Court of the United States.

DAVID BARNET and ISAAC E. CRAIG, Assignees of BARNETS & WHITESIDE, Plaintiffs in Error,
vs.
THE MUNCIE NATIONAL BANK OF MUNCIE INDIANA, Defendant in Error.

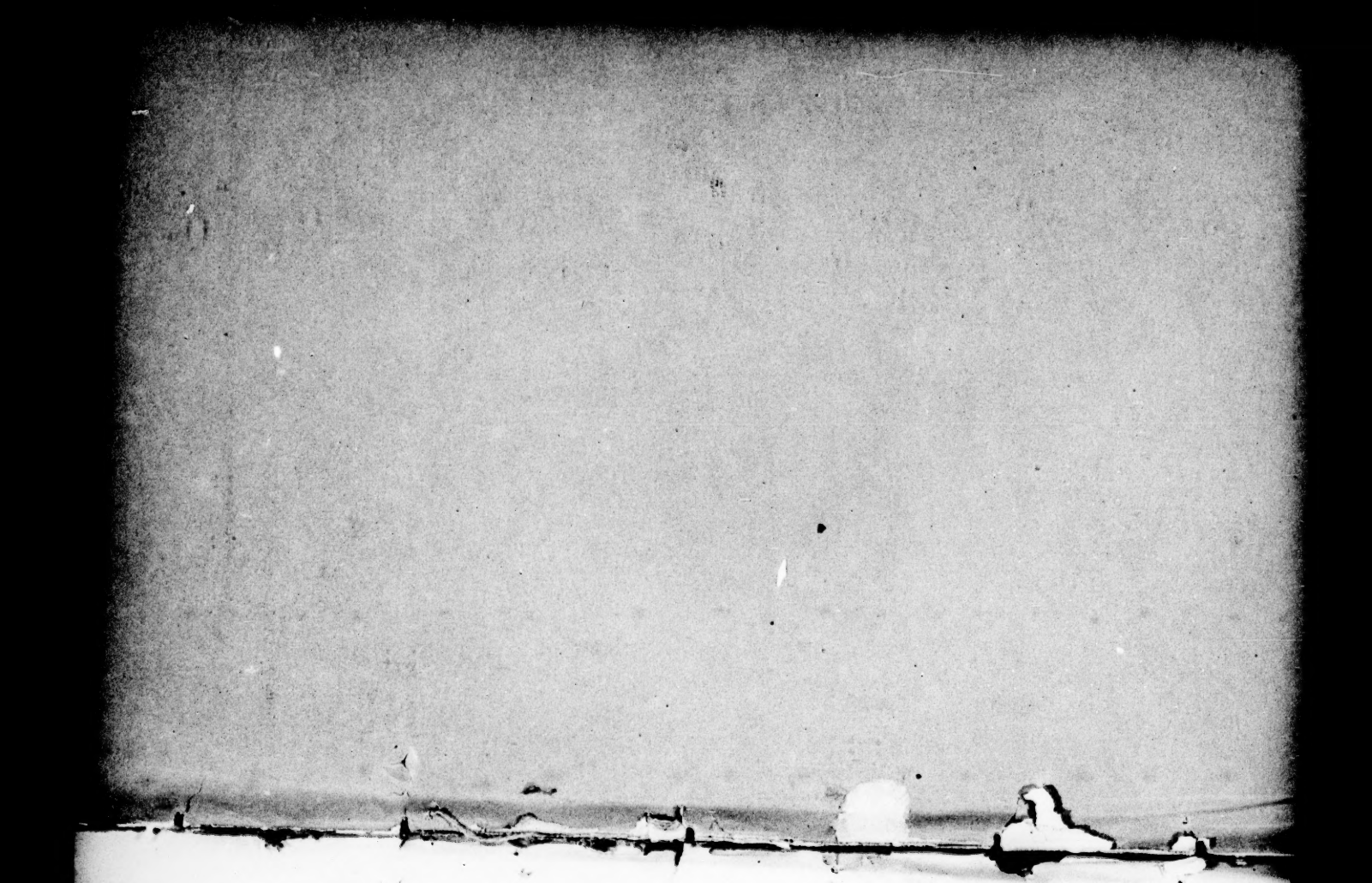
In error.
Of October Term, in the year of our Lord 1878.

Afterwards, to wit: on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said David Barnet and Isaac E. Craig, assignees of Barnets & Whitesides, by Isaac E. Craig and Robert B. Wilson, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given was given for the said The Muncie National Bank of Muncie, Indiana, against the said David Barnet and Isaac E. Craig, assignees of Barnet & Whiteside, whereas, by the law of the land, the said judgment ought to have been given for the said David Barnet and Isaac E. Craig, assignees of Barnets & Whiteside, against the said The Muncie National Bank of Muncie, Indiana; and the said
83 David Barnet & Isaac E. Craig, assignees of Barnets & Whiteside, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they

may be restored to all things which they have lost by occasion of the said judgment, etc.

I. E. CRAIG & R. B. WILSON,
Attys. for Plaintiffs in Error.

(Endorsed on cover.) S. Ohio, C. C. U. S., No. 856. David Barnet and Isaac E. Craig, assignees of Barnets & Whiteside, plaintiffs in error, *vs.* The Muncie National Bank of Muncie, Indiana. Filed 12th October, 1878.



Supreme Court of the United States.

No. 856.

BARNET & CRAIG, ASSIGNEES, &c., PLAINTIFFS IN ERROR,

vs.

THE MUNCIE NATIONAL BANK, DEFENDANT IN ERROR.

When the brief of the attorney of plaintiffs in error, R. B. Wilson, Esq., with whom we are associated, was prepared, the record in the case had not been printed, and hence in that brief there is no reference made to the printed pages of the record. Although the statement of facts in that brief is quite full and complete, for convenience we will here state—

1st. That the defendant in error brought suit in the Court of Common Pleas of Preble county, Ohio, against divers parties, on a bill of exchange for four thousand dollars, ($4,000,) dated Muncie, Ind., and payable at the Second National Bank of Cincinnati, Ohio. (See Record, pp. 1 and 2.) The bill was accepted in the firm-name, by a firm doing business under the name of Barnets & Whiteside.

2d. After the drawing, indorsing, and accepting of the bill, Barnets & Whiteside, the acceptors, made an assignment to the plaintiffs in error, for the benefit of their creditors, under the general assignment law of the State of Ohio.

3d. This suit having been brought as above stated, the plaintiffs in error, as assignees, by leave of the said Common Pleas Court, became defendants in the action, and filed three defenses, two of them, the first and third, being also in the nature of a cross-petition. (See Record, pp. 7, 8.)

4th. The first of these defenses alleged, in substance, that the bill sued on was part and parcel of an indebtedness that had begun by a loaning of money to these acceptors some years before; that this loan had been changed in form until it had finally resulted in this bill of exchange, and that a large amount of usurious interest had been paid on account of these transactions, largely in excess of the amount of the bill sued upon.

5th. The second defense was likewise a plea of usury, but as no demurrer was ever sustained to it, it is not necessary to be further noticed.

6th. The third defense alleged that the defendant in error had, on divers occasions, taken from the said acceptors large amounts of illegal interest, and claimed a recovery against the defendant in error for double the amount of the excessive interest which had thus been taken.

7th. In the said Court of Common Pleas, while the cause was still pending there, the defendant in error demurred to the third of these defenses, but did not demur to either the first or second. (See Record, p. 11.)

Other pleadings were filed by other parties which it is not important to notice, and afterwards the plaintiffs in error amended their third defense, as appears on pages 17 and 18 of the record, setting out in detail the excessive interest that had been paid, and claiming a recovery against the defendant in error for double the amount of the excessive interest.

8th. After filing this amended defense, the defendant in error filed a petition, and procured the cause to be certified, with all the records and pleadings, to the Circuit

Court of the United States for the southern district of Ohio. (See Record, pp. 19, 22.)

9th. The case having thus been brought to the Circuit Court of the United States, and the plaintiffs in error being parties to it, thereupon new pleadings seem to have been filed. The defendant in error filed a petition, the same in substance as the one before alluded to. (See Record, pp. 22, 23.) The plaintiffs in error, Barnet & Craig, filed their same three defenses; (see Record, pp. 25, 26, 27;) and to the first and third of these defenses, to wit, the answers and cross-petitions, the defendant in error filed a demurrer, upon the sole ground that the plaintiffs in error had not "legal capacity to make the defense and to sue the plaintiff." (See Record, p. 32.) This demurrer was sustained by the court to the said first and third defenses. (See Record, p. 34.)

Assignment of Errors.

First. The court below erred in sustaining the demurrer to the plaintiffs in error's first answer and cross-petition.

Second. The court below erred in sustaining the demurrer to the plaintiffs in error's third answer and cross-petition.

Rights not changed by Removal from State to Federal Court.

It will hardly be contended that the rights of the parties were in any degree changed because the defendant in error removed the case from the State to the Federal court.

Whatever would have been available to plaintiffs in error to defeat this action in the State court, was equally available in the Circuit Court.

The defendant in error could not defeat a right of the plaintiff in error by retreating from one forum to another. (Rev. Stat., sec. 639.)

Statutes of Ohio.

In accordance with the rule of this court, we quote such of the statutes of Ohio as it will be necessary to consider in the determination of the questions involved.

Sec. 87 (Ohio Code). The defendant may demur to the petition, only when it appears on its face, either—

1. That the court has no jurisdiction of the person of the defendant or the subject of the action.
2. That the plaintiff has not legal capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties plaintiff or defendant.
5. That several causes of action are improperly joined.
6. That the petition does not state facts sufficient to constitute a cause of action.

Sec. 101. The plaintiff may demur to one or more of the defenses set up in the answer, stating in his demurrer the grounds thereof; and where the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition constituting an answer in law to such new matter. To this reply the defendant may demur.

The First Defense.

The sufficiency of the averments of the first defense and cross-petition to constitute the defense of *payment* because of usurious interest paid, (under the statute of Ohio hereafter to be quoted,) is not challenged by the demurrer.

By the Ohio Code, as above quoted, insufficiency of facts is made a specific cause of demurrer. If a demurrer is sustained for such ground, the party may amend. When a demurrer is sustained for a different cause, such as the want of capacity to sue, as in this case, it cannot afterwards

be claimed that the pleading is bad for some other reason, because that would prevent the party from exercising his right of amendment.

This demurrer, therefore, concedes the sufficiency of the averments to make a case of usury.

But if it should be contended that the pleading is bad for any other cause than that set up in the demurrer, viz., want of "capacity to sue," then we say that it contains all the essential elements of a sufficient pleading.

The law of the place of performance of a contract governs as to its validity, nature, obligation, and interpretation.

Tyler on Usury, p. 70.
Story's Confl. of Laws, sec. 280.
Andrews *v.* Pond, 13 Pet., 65, 78.

If a contract is usurious at the place of performance, the law of that place must govern.

Tyler on Usury, 81, 83.

This contract, although alleged to have been made in Indiana, was to be performed in Ohio, and was governed by the laws of that State, and hence it was not necessary to plead any statute.

Nor can this pleading be held bad because it sets up usurious interest paid on anterior notes or bills.

According to the averments, here was a lending of money, and for the purpose of concealing the usury, the device was resorted to of numerous bills and renewals, &c.; and, in the language of the syllabus in the case of *Nickey* v. *Dixon*, 35 Barb., 96, "The original taint of usury attaches to all consecutive securities growing out of the original vicious transaction."

This doctrine is well settled.

Walker *v.* Bank of Washington, 3 How., 62.
Judy *v.* Girard, 4 McLean, 360.
Campbell *v.* McHarg, 9 Ia., 354.
Smith *v.* Cooper, 9 Ia., 376.

Effect of Usury under Ohio Statute.

We have above shown that the law of the place of performance governs.

The following is the Ohio statute, touching the right of recovery in a case where usurious interest has been paid (1 S. & C., (Statutes,) 744):

"Section 1. Be it enacted by the General Assembly of the State of Ohio, That in all *actions for the recovery of money hereafter prosecuted in the courts of this State, all payments of money or property made by way of usurious interest*, whether made in advance or not, shall be deemed and taken, as to the excess of interest above the rate allowed by law at the time of making the contract, to be *payments made on account of principal;* and the said court shall render judgment for *no more than the balance found due after deducting the excess of interest so paid*, nor shall any debtor be deemed a *particeps criminis* on account of having paid, or having agreed to pay, such exorbitant interest, but shall have like remedy and relief in either case: *Provided*, That no *bona-fide* indorsee of negotiable paper, purchased before due, shall be affected by any usury exacted by any former holder of such paper, unless he shall have actual notice of the usury previously to his purchase; but the amount of such excess incorporated into negotiable paper may, in such cases, after payment, be recovered back, by action against the party originally exacting the usury, in any court of competent jurisdiction."

Here, then, we have a case in which, by the averments of the pleading in question, there was paid as usurious interest an excess over the legal interest of more than the amount of the bill sued on, and this statute is specific and emphatic that that shall be deemed a *payment* on the principal.

There was but one escape from this, and that was to challenge the capacity of plaintiffs in error to plead it.

This question has been so ably and exhaustively discussed in the brief of our associate, that we shall do little further than to quote the statutes bearing on the subject.

Plaintiffs in Error were Proper Parties.

They were trustees of an express trust, by virtue of an assignment to them under the Ohio insolvent laws, by the provisions of which laws, as will appear, the entire estate of the assignors passed to them, to be administered, under the guidance of the Probate Court, as fully and completely as though it were an estate of a decedent being administered in the same court by an executor or administrator.

By the statute of Ohio, in relation to administering assignments in trust for the benefit of creditors, 1 S. & C., 709, it is provided, in section 1, that the assignee shall, within ten days after the delivery of the assignment to him, appear before the probate judge of the county in which the assignor resided, and file the assignment and enter into an undertaking with sureties conditioned for the faithful performance of his duties according to law, "on which undertaking any person injured by the misconduct or neglect of duty of the assignee in regard to said trust, may bring action thereon in his own name against the assignee and his sureties, to recover the amount to which he may be entitled by reason of the delinquency. * * * The probate judge shall have power to require the assignee to execute an additional undertaking whenever the interests of the creditors of the assignor demand the same, and action may be brought thereon as upon an original undertaking."

Section 2 provides that if the assignee does not, within ten days, comply with the provisions of the first section, he may be removed and another appointed in his stead, and "the probate judge shall make and enforce all necessary orders to put the said trustee so appointed into possession of any property, money, rights, or credits belonging to the assignor at the time he made the assignment."

Section 3 requires that the assignee shall, within thirty days, file in the office of the probate judge "an inventory under oath of the property, money, rights, and credits of

the said assignor which shall have come to his possession or knowledge," and for the appraisement thereof.

Section 4 provides that he shall file "a schedule, verified under oath, of all debts and liabilities of the assignor within his knowledge," and give notice thereof in a newspaper.

Section 5 provides for the conversion of the assets into money.

Section 6 is as follows: "Creditors shall present their claims, within six months after the publication of the notice provided for in section 4 of this act, to the assignee for allowance, and the assignee shall indorse his allowance or rejection thereon, and claimants whose claims are rejected shall be required to bring suit against the assignee to enforce such claims within thirty days after the same shall have been rejected, in which, if he recover, the judgment shall be against the assignee, that he allow the same in settlement of his trusts, with or without the costs, as the court shall think right: *Provided, however*, That the assignee may make any defense to such action that the assignor might have made to a suit instituted against him before the assignment for the same cause of action."

Section 8 provides: "If the assignee or creditor shall file in the Probate Court a written requisition on the assignee to disallow any claim or claims presented, which he has not reported as disallowed, and shall enter into an undertaking, with surety or sureties to be approved by the probate judge, conditioned to pay all the costs and expenses of contesting the same, such claim or claims shall be ordered to be disallowed, and the same proceeding shall be had as required in other cases of disallowance by the foregoing section.

Section 12 provides: "In case the assignee or any creditor has reason to believe, and makes affidavit thereof, that the assignor has not surrendered all the property and effects embraced in the assignment; or that he has property or effects which he conceals and refuses to apply to the payment of his debts; or that he has conveyed or assigned any prop-

erty or effects for the purpose of hindering, delaying, or defrauding his creditors, or is about to do so, the probate judge shall cause him to appear in open court or before a referee and answer under oath all interrogatories concerning the same, and may make all necessary orders upon proper parties to prevent any further transfers and changes in any property and effects which he thinks belong to the debtor and should be applied to the payment of his debts; but no such order shall have the effect to alter the title or possession of any property or effects claimed or possessed by any third person."

Section 13 provides: "Every person presenting and filing a claim against the estate of the debtor, and before the same shall be allowed or any payments made thereon, shall make and file an affidavit setting forth that the said claim is just and lawful, what collateral or personal security, if any, the claimant holds for the same, or that he has no security whatever, and the assignee or any creditor shall have the right to examine the claimant under oath touching any such collateral or other security, *or any other matter* relating to said claim, within such time and under such regulations as shall be prescribed by the probate judge."

The provisions in this statute to which we especially invite attention are—

1st. That it carefully provides that every part of the estate of the insolvent shall pass to the assignee for the benefit of creditors.

2d. That creditors must present their claims to the assignee for allowance or rejection.

3d. If rejected by the assignee, then for a suit by the creditor against the assignee.

4th. In case of such suit, the assignee may plead any

defense that the assignor might have plead if the suit had been against him before assignment.

5th. That any creditor can object to the allowance of a claim, and cause its integrity to be litigated in the proper court.

6th. The duties everywhere appearing in this act of the assignee to see to it that no claim is allowed against which there is a valid defense.

7th. The duty imposed by the act upon him to gather together all the estate, of whatever name or nature, for the benefit of all just claims.

8th. The performance of these duties is secured by a bond, on which he is liable for misfeasance, malfeasance, or nonfeasance. He is liable if he pays a debt that should not be paid, or if he fails to collect money that should be collected.

9th. He may sue to collect moneys due or recover property belonging to the estate; he may be sued in respect of claims against it.

10th. Property and assets not named in the assignment pass by it to him, just the same as though specifically set forth therein.

It is not too much to say of this statute, that under it every interest in all that the assignor has by way of estate or assets passes to the assignee; and whatever the assignor could do in respect of suing to recover, or in defending suits, may be done by the assignee. Such being the status of the assignees when this suit was brought, and having the duty resting upon them not to allow this trust to be

burdened with a claim that had already been paid, they asked permission to be made parties defendant. This was authorized by the following section of the Ohio Code:

"Sec. 35. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

Under the insolvent law above quoted, it is clear that the assignees (plaintiffs in error) had an interest in the controversy. Even if the acceptors had stood by and permitted a judgment to be rendered on this bill, the assignees would not have been concluded by that judgment, (if not parties,) and, under the insolvent act, they could refuse to allow it, or pay dividends upon it, upon the ground that the demand on which it was rendered had already been paid, or upon the ground that the claim was without consideration, and had been collusively rendered, &c. Any creditor could object to the payment of such a judgment, and compel judicial inquiry into the claim on which it was rendered. Hence the plaintiffs in error not only had an interest in the controversy, but they were "necessary parties to a complete determination or settlement of the questions involved." They were, therefore, properly admitted as parties defendant. Being so admitted, they might file an answer, as provided by the following sections of the Ohio Code:

Section 92. The answer shall contain—

1. A general or specific denial of each material allegation of the petition controverted by the defendant.

2. A statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language, and without repetition.

Section 93. The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as

he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer.

Section 94. The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and *arising out of the contract or transaction* set forth in the petition as the foundation of the plaintiff's claim, or *connected with the subject of the action.*

The defense set forth in the pleading now under consideration was, that the bill had been paid.

We think it plain that the court erred in sustaining this demurrer to this first defense.

The Third Defense and Cross-Petition.

The substance of the averments in this is, that within two years the defendant in error, a national bank, had reserved to itself, and the acceptors had paid, sums of money aggregating $6,324 in excess of the interest which defendant in error was by law authorized to receive, and judgment is demanded for double that sum.

The demurrer to this was for want of capacity in the plaintiffs in error to sue.

The statute provides (sec. 5198, Rev. Stat.) "that in case the greater rate of interest has been paid, *the person by whom it has been paid, or his legal representatives*, may recover back in an action in the nature of an action of debt," &c.

There can be no doubt that an action could be maintained by Barnetts & Whiteside (plaintiffs in error's assignors) for this demand. There can be no doubt that if this illegal interest had been paid by an individual, his executor or administrator could maintain the action. But the money was paid by a firm, and we suppose it will not be pretended that for that reason there is no liability by

the defendant in error under this statute; and of course the legal representatives of the firm, whoever they may be, may maintain it.

Who, then, are the legal representatives of this firm? According to the pleadings, this firm had ceased to exist. It had made an assignment to these plaintiffs in error under the statute to which we have before alluded. They took all the property of every kind, and as to that and the indebtedness, so far as the application of assets thereto was concerned, they stood by the law of Ohio in the stead or as the legal representatives of their assignors.

Whether or not the plaintiffs in error are "legal representatives," has been so thoroughly discussed in the brief of our associate that we cannot, and will not, attempt to add to its strength.

The case of Crocker, Assignee, &c., *v.* The First National Bank of Chetoka, cited by our associate in his brief, is now reported in 4 Dillon, 358. This was an action by the assignee in bankruptcy to recover double the amount of usurious interest that had been paid by the bankrupt, under section 5198 of the Revised Statutes. From the opinion in that case we quote as follows:

"2. The next question is, is the assignee in bankruptcy their 'legal representative' within the meaning of the statute? (Revised Stats., sec. 5198.) It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced by 'an action in the nature of an action of debt,' effectually and most appropriately a 'legal representative' of the bankrupt. Every reason which, in case of the death of the debtor without bankruptcy, would give the right of action to the administrator or executor as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is during his lifetime administered in a court of bankruptcy."

In support of this, is cited Tiffany *v.* The National Bank of Mo., 18 Wall., 408; Dear. Bankr., 3d ed., 523, 524;

Beckham *v.* Drake, 2 H. & S. Cases, 640. To the same effect as Crocker *v.* The National Bank, *supra*, see *in re* Wild, 11 Blatchford, 243. See also First National Bank of Whitehall *v.* Lamb *et al.*, 50 N. Y., 95.

In the case of Wright *v.* The First National Bank, 18 Albany Law Journal, 115, after a careful review of all the authorities, the court held as follows:

"I think the assignees are the legal representatives of the bankrupts within the meaning of the thirtieth section of the Banking Act; and that the right of action given by said section is a 'claim' or 'debt' which passed to the assignees under the sections of the bankruptcy law already cited."

As we have above shown, by reference to the Ohio statutes touching insolvent debtors, above referred to, all of the property, debts, choses in action, &c., indeed, the entire estate of the assignor, of whatever description it may be, passes to the assignee. The question is made in this case whether a claim like this can be regarded as having passed by such an assignment. In the case last cited it is held that it does; and on this point, and upon the question as to whether the assignee can sue for such a demand, we especially call the attention of the court to the case of Gray *v.* Bennett, 3 Metc., (Mass.,) 522. That case was elaborately argued by such eminent counsel as the Hon. B. R. Curtis and Mr. Sidney Bartlett, in whose briefs the authorities are extensively collected. The suit was to recover threefold the amount of usurious interest alleged to have been paid by the insolvent debtor to the defendant on sundry loans of money. The court held, that, by the assignment, this right of action which the statute had vested in the insolvent debtor passed by the assignment of his estate to the assignee, and the assignee could maintain an action to recover it. The same argument that is made in this case against such a claim being transferable to the assignee, was made in that case. In the opinion of the court, at page 531, the following language occurs:

"It is very certain, that if a creditor of an insolvent should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor has paid the usurious demand prior to the insolvency, and within the time limited by the statute for recovering it? If the insolvent debtor alone could recover the threefold amount given by the statute, and he should not be held accountable for its receipt to his assignees, it would counteract the intention of the statute, and defeat its wise provision, that all the estate of the bankrupt shall be divided among his creditors. The tendency, also, of such a limited construction of the statute would be to produce fraud and collusion between the borrower and lender, or at least to make debtors more reckless and usurers more greedy. On the other hand, the knowledge that the assignee can, in his own name, recover threefold the amount of excessive interest, paid or reserved, will operate beneficially for both the debtor and his honest creditors, by restraining persons in some measure from the commission of the offense intended to be prevented by the statute."

If such a claim passes to an assignee in bankruptcy, it will be difficult to find a valid reason why it does not pass to the assignee under this insolvent law.

It being thus settled that it did pass to these plaintiffs in error, the remaining question is whether they could recover it in this action.

They could maintain a suit on it under the Ohio Code. Section 27 is as follows:

"An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

Having been admitted as defendants, what they might answer or plead by way of cross-petition is shown by the statute on that subject above quoted. (Secs. 92, 93, 94.)

The defendant in error was seeking to recover on a bill of exchange. On that bill and its forerunners, all united together as one transaction, and all alike tainted, there had been paid this named sum of usurious interest, in violation of the thirtieth section of the National Banking Act. By this act of Congress, double this sum paid became an obligation growing out of this transaction, which could be recovered in an action in the nature of an action of debt.

The right to recover it by the plaintiffs in error being established, all that is necessary to enable them to do so in this case, is that it shall "*arise out of the contract or transaction set forth in the petition*," or be "connected with the subject of the action."

But for the "transaction," or the "subject of the action," set forth in defendant in error's petition, it *never would or could have had an existence*. It was born of that transaction. Every effort to collect it necessarily involves the examination of the subject of this action. The two are so connected with each other as to be inseparable.

We submit, therefore, that these plaintiffs in error had the right in this suit to recover this debt, and that the court below erred in sustaining the demurrer to the third defense and cross-petition.

SHELLABARGER & WILSON,
of Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

David Barnet and Isaac E. Craig,
Assignees of Barnets & Whiteside,
Plaintiffs in Error.

vs.

The Muncie National Bank of Muncie Indiana,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR PLAINTIFFS IN ERROR.

By R. B. WILSON,
Of Their Counsel.

W. B. CARPENTER & CO., Stationers, 128 Walnut St. Cin.

IN THE

Supreme Court of the United States.

David Barnet and Isaac E. Craig,
Assignees of Barnets & Whiteside,
Plaintiffs in Error.

vs.

The Muncie National Bank of Muncie Indiana,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR PLAINTIFFS IN ERROR.

By R. B. WILSON,
Of Their Counsel.

This action is prosecuted to reverse the finding and decree made by the Circuit Court of the U. S. for the Southern District of Ohio, sustaining a demurrer to the first and third defenses of the answer and cross petition of Plaintiffs in error, to the petition of The Muncie National Bank (the defendant in error), plaintiff in an action originally brought in the Court of Common Pleas

of the County of Preble and State of Ohio, against David Barnet as drawer, Barnets & Whiteside as acceptors, and Robert Marshall as endorser of a certain bill of exchange, and afterwards upon the petition of said plaintiff, the Muncie National Bank, removed into the said Circuit Court of the United States.

The action of plaintiff below was upon the following bill of exchange.

$4,000 00 Muncie, Indiana, November 13th, 1873.

Ninety days after date of this only bill of exchange, pay to the order of Robert Marshall at the Second National Bank, Cincinnati, four thousand dollars, value received without any relief from valuation and appraisement laws, and charge to account of yours. The drawers and endorsers dispense with notice of non-payment of bill and protest to be evidence of presentment, and if suit be instituted on this bill, the drawer, endorsers and acceptors promise to pay five per cent. attorneys fees and the costs and charges for the collection thereof with ten per cent. interest after maturity until paid for value received.

To Barnets & Whiteside. David Barnet.

Camden, Ohio.

Endorsed upon the face of thereof, "Barnets & Whiteside."
Endorsed, Robert Marshall.

To this action James Barnet, Lewis Barnet, William Barnet and William Whiteside partners as Barnets & Whiteside, Robert Marshall and David Barnet were made parties defendant, the petition of the plaintiff alleging that the said David Barnet was liable as drawer, the said firm of Barnets & Whiteside as acceptors and Robert Marshall as endorser, upon said bill of exchange.

By leave of Court, to this petition the plaintiff in error, as the assignees for the benefit of creditors of the said firm of Barnets & Whiteside, filed their answer and cross petition, in which they allege in substance as follows:

1. That by a deed of assignment made for the benefit of creditors executed and delivered to them, by the said defendants James Barnet, Lewis Barnet, William Barnet and William Whiteside, on the 27th day of December 1873, and the proceedings relative thereto in the Probate Court of Preble County Ohio, they became duly qualified as the assignees of the said grantors, and entered on the execution of their said trust.

That the said Barnets & Whiteside had been since 1866 largely indebted to said bank for borrowed money, which, at the date of their said assignment, amounted to $28,000.

That for the purpose of evading the operation of laws relating to usury, the bank had made an arbitrary and fictitious division of said indebtedness, which was, in fact, one debt, and had required Barnets & Whiteside to keep the same represented by a series of accommodation bills of exchange, running for 90 days, which from time to time as they matured were either renewed, or fictitious payments thereof made with the proceeds of new bills discounted for them by said bank.

That the bill of exchange sued on was the last of said bills representing said indebtedness remaining unpaid.

That upon said indebtedness there had been paid to said Bank by Barnets & Whiteside, by way of discounts on said bills, more than $15,000 interest, not less than $5,000 of which amount was usurious and in excess of the legal rate, by reason of which they claim that there is nothing due upon said bill.

2. And as a second ground of defense to said petition it is alleged that the bill sued on is the 8th, renewal of a bill dated November 21, 1871, upon which, and upon each renewal thereof, said bank had reserved an illegal and usurious discount of $124, amounting in the aggregate to $1,116, which sum they ask shall be applied as a payment on said bill.

3. And by way of set-off to said bill it is alleged that said

plaintiff is an institution organized and doing business under an Act of Congress, passed June 3, 1864, providing for the organization and regulating the conduct of National Banks, and that as such the plaintiff, within two years next preceeding the bringing of this action upon each of 51 specified bills of exchange, each for $4,000, and running ninety days, discounted for said Barnets & Whiteside, had taken, received and reserved, a discount of $124, amounting in the aggregate to the sum of $6,324 00. That the rate of discount charged by plaintiff and paid by said Barnets & Whiteside upon said bills was usurious, and in excess of the rate which by law said bank could charge and receive, whereby said assignees, as the legal representatives of Barnets & Whiteside, had become entitled to recover from said bank double the amount of said sum of $6,324, to-wit, the sum of $12,648 00, for which sum they ask judgment.

To this answer and cross petition the plaintiff below interposed a demurrer upon the ground that the assignees of Barnets & Whiteside have not the legal capacity to make the defense and sue the plaintiff.

The demurrer was sustained as to the first and third defenses, and overruled as to the second.

I.

I. AS TO LEGAL CAPACITY OF THE ASSIGNEES TO MAKE THE FIRST DEFENSE.

That the Assignees of Barnets & Whiteside are proper parties defendant for *some purposes* is fully recognized by the Court below, inasmuch as it has sustained their right and legal capacity to maintain the second defense set up in their answer and cross petition.

Under the provisions of the Ohio Code Sec. 35, any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff.

The Assignees of Barnets & Whiteside were charged by law with the distribution of all the property of their assignors for the benefit of their creditors. It was therefore incumbent upon them to ascertain who were creditors, and to assert and maintain whatever defenses, counter-claims or set-offs existed in favor of their assignors to claims made against them, and to bring such actions as were neccessary to put them in possession of any property or rights of their assignors. When therefore it was sought by the plaintiffs below to obtain a judgement against their assignors and sureties upon claims against them, whatever defense except such as was strictly personal to their assignors, that could be set up by them to such action, the assignees were bound to make, and whatever counter-claims or set-offs against the claim existed in favor of Barnets and Whiteside, they were equally bound to set up in defense.

The first defense interposed by the assignees to the bill sued on is that of usury. The right of an assignee for the benefit of creditors to set up the defense of usury is well settled.

Beach vs. Fulton Bank 3 *Wend.* 573.
Pearsall vs. Kingland 3 *Edwards Ch. R* 195.
Union Bank vs. Bell, et al. 14 *O. S.* 210, 211.

The demurrer to the answer being upon the ground of the want of legal capacity of the assignees to sue or defend, it is difficult to see how the Court below could find that they had the legal capacity to make the second defense, and not the first, the plea in both being usury. It is evident that it must have been sustained on other grounds than stated in the demurrer, and that went to the sufficiency of the facts set up to constitute a defense.

The ground of the demurrer is one of six, which under the Ohio code may be interposed to a pleading. Having stated the ground relied on, judgment can only be obtained for the cause stated in the demurrer.

Sections 87 *and* 101 *Ohio Code, S. & C. Stat. vol.* 11, 973 *and* 981.
Wilson vs. Mayor N. Y., 45 *Howard* 500.
Loomis vs. Tift 16 *Barbour* 541.

This provision of the Ohio Code was binding upon the Court below.

Sec. 914 *Revised Statutes U. S.*

The Court, therefore, erred in sustaining the demurrer to the first defense.

2. AS TO THE LEGAL CAPACITY OF THE ASSIGNEES TO MAKE THEIR THIRD DEFENSE.

The Court erred in sustaining said demurrer to the third defense and cross petition of the plaintiffs in error.

In addition to the other defenses set up, the assignees of Barnets & Whiteside, by way of cross petition, seek to recover, under the provisions of Section 30 of the National Banking Act (section 5198 of the Revised Statutes of the United States), twice the amount of the entire interest paid within two years previous, upon certain bills discounted by the defendant in error, on which it had taken, received and charged a greater rate than allowed by law.

They are entitled and have the legal capacity to maintain this action on two grounds.

First—That they are the "legal representatives" of Barnets & Whiteside.

Second—That the right of action of Barnets & Whiteside against the bank, passed to them by assignment.

Section 30 gives the right to recover "in an action of debt twice the amount of the interest thus paid from the association, taking or receiving the same," and the right is given to "*the person or persons paying the same or their legal representatives.*"

It will be claimed that Section 30 is penal, and must, therefore, be strictly construed. In the case of *The Farmers &c. National Bank vs. Deering*, 1 *Otto*, *p.* 29, 35, this Court in reference to this section say, "The 30th section is *remedial* as well as penal, and is to be *liberally* construed to effect the object which Congress had in view in enacting it."

It is evident that if Congress had intended to confer a strictly personal remedy, that the words "or their legal representatives," would not have been added, and that they were intended to *enlarge*, and not to restrict the right conferred.

If to enlarge, to what degree do the words used do so, is the question involved in the present case. It will be claimed that "legal representatives" as used, means executor, administrator or heirs only.

If Congress had intended to extend the right of action to the heirs, or to the executor and administrator of the persons paying the usurious interest only, would it not have used those very words to express that intention, they being terms without any question as to their signification, and will it not be presumed that if it has used a term of more general and comprehensive signification, embracing not only heirs, executors and administrators, but others, that it did so advisedly, and with the distinct purpose of enlarging the remedy to the full signification of the term used?

The term "legal representatives" is an elastic one, if it may be so expressed—intended to meet the possibilities and contingencies of each particular case, which the future may develop, and which can not be foreseen, where the use of a more specific term embraced within it, might defeat the intention, or work absolute injustice.

But while general, it is yet no less definite in its signification, the facts and circumstances of each case pointing out the person

or class of persons to which it refers. In other words, it designates the person or persons who, in law, are entitled to represent, or stand in the place of another with reference to his property or rights when that other is by death, or other legal disability, no longer capable of representing himself or his property.

Whether the "legal representative" be the executor, administrator, heir, legatee, assignee, grantee, devisee, purchaser, next of kin, or descendants, depends entirely upon the circumstances of each particular case.

In *Hogan vs. Paige* 2 *Wallace, p.* 605. Justice Nelson, in delivering the opinion of the court, says: "This formula or 'legal representatives' embraces representatives of the orginal grantor in the land *by contract,* such as assignees and grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent or confirmation should inure."

This construction of the term is approved and affirmed in *Carpenter vs. Rannels,* 19 *Wallace p.* 138.

The Supreme Court of Illinois, in the well considered case of *Warnecka vs. Lemka,* 71 Ill., 91, in construing the term "legal representatives," say:

"It is well known the term does not always have the same signification. Legal representatives or personal representatives in the commonly accepted sense means administrator or executor, but this is not the only definition. It may mean heirs next of kin, or descendants. The sense in which the term is to be understood, depends somewhat upon the intention of the parties using it, and is to be gathered, not always from the instrument itself, but as well from the attending circumstances. It will be observed these definitions of 'legal representatives' have reference exclusively to administration of estates, both testate and intestate, and the relation certain parties bear to deceased

persons. It seems to us illogical to say the term "legal representative," as used in the deed, comes within any of the definitions given.

When found in instruments other than those relating to the administration of estates or the affairs of deceased persons, it has been construed sometimes to mean *assignees*, or a certain class of purchasers accordingly as it was supposed the parties understood it."

In *Delaney vs. Burnett* 4 *Gill* 454, it was declared the *purchaser of a pre-emption right* is to be regarded as the *legal representative* of the original claimant under the act of Congress granting such right.

In *The Grand Gulf R. & B. Co. vs. Brayan* 8 *S. & M.* 234, the Court held, "The term "legal representative," used in the act of Congress of March, 1803, touching pre-emption claims under the act does not mean children or heirs only, it embraces also *assignees* and *grantees*, who, in regard to the thing assigned or granted, are the *legal representatives* of the assignor and grantor." Chief Justice Sharkey, in delivering the opinion of the Court in this case, says: "In legal parlance the executor or administrator is most commonly called the 'legal representative.' Still, in regard to things real, the heir is also the legal representative, and so is the devisee who takes by purchase. Heirs may be the legal representatives, and they may not. Suppose by will a testator should give his land to one who is not an heir, the devisee would be the legal representative in regard to the thing devised. An *assignee* or *grantee* is a legal representative of the *assignor* in regard to the thing granted. If Congress had intended that heirs only should be entitled to represent the original settler, *it is remarkable that the word 'heirs' was not used.* Its meaning is well known. It is the appropriate expression when those on whom the law casts the estate are spoken of, *and as Congress used a phrase more compre-*

hensive, we must suppose other persons besides heirs were intended. General expressions in law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense. A representative is one who exercises power derived from another. The purchaser derives his power over the estate from his vendor."

In the case of *Morrison et al. vs. Jackson* 2 *Otto* 655, this Court has also held, "where Congress, in 1842, directed a patent for certain lands to issue to S. or his *legal representative*, and the patent was accordingly issued February 1, 1869, that by virtue of the deed of S. his grantee H. became his *legal representative*, and acquired as against the heirs at law of S. the title to all the tracts of land described in the patent."

From the foregoing cases, it is evident that Congress has never used the term "legal representative" in the narrow sense in which it is sought to have it interpreted in this case. Is there any reason why its meaning should be so restricted in the present case more than existed in the cases cited? Is there any good reason why Congress should give to the creditors of a deceased person having such right of action, the benefit of it through his executor or administrator, and deny the same benefit to them through an assignee for benefit of creditors, or in bankruptcy?

In two recent cases it has been held that the latter was the legal representative of the borrower within the meaning of the 30th section.

In *Wright vs. First National Bank of Greensburg*, 18 *Alb. L. J.* 115, decided in the United States Circuit Court for the District of Indiana, it was held by *Gresham J.* that an assignee in bankruptcy might sue a National bank for double the amount of usurious interest received by it from the bankrupt, an assignee in bankruptcy being within the term "legal representative" as used in the 30th section of the banking act."

In *Crocker vs. First National Bank* 3 *Cent. L. J.* 527, the precise question raised in Wright v, First National Bank, was considered, and it was held by Dillon, C. J., that the assignee was the "legal representative" of the borrower within the meaning of the 30th section, and as such could maintain the suit whether the right of action vested in the assignee under the bankrupt law or not.

There is no reason that can be urged in favor of an assignee in bankruptcy, being the "legal representative," or even an executor, that does not apply with equal force and weight in favor of an assignee for the benefit of creditors, duly qualified under the statute of Ohio regulating such assignments. In all their essential features, the powers, duties and trusts imposed upon an assignee for the benefit of creditors by this statute (S. & C. Stat. 709) are similar to those of an assignee in bankruptcy.

The scope and effect of this statute has been fully stated by the Supreme Court of Ohio in *Thomas, assignee, vs. Talmadge et. al.* 16 *O. S. p.* 437, and by this court in *Mayer et al. vs. Hellman, assignee, N. B. R., vol.* 13, *p.* 444.

It does not compel, nor even authorize assignments. It assumes that such conveyances were previously known, and only prescribes the mode in which the trust may be enforced. By it all assignments, whether such as are made in good faith, for the benefit of all the creditors, or such as are made in contemplation of insolvency with intent to prefer one or more creditors, and all transfers and conveyances made with intent to defraud creditors, though no trust for the benefit of creditors may be designed or declared in making the transfer or conveyance, are made to inure to the benefit of all the creditors.

By it all the property, money, rights, credits, and effects of the assignor, (except such as is by law exempt) are transferred to the assignee, whether the assignor so intended or not, and in case

any of the property is withheld, concealed, or conveyed in fraud of the rights of creditors, the assignee may invoke the aid of the courts to put him in possession.

It requires the assignee to reduce all the property so assigned to money, and to distribute the same for the benefit of all the creditors in proportion to the amount of their respective claims.

He is required to file the deed of assignment with the Probate Court, formally accept the trust, and to enter into bond for the faithful performance of it. In case he fails to do so the Court may appoint an assignee to take his place.

He is required to return to the court an inventory of all the property of the assignor that shall come to his possession or *knowledge*.

He may make such defense to any suits to enforce claims against the assignee, as the assignor might have made before assignment to the same cause of action.

If he fails to perform the duties required of him under the act, the Probate Court may remove him and appoint another in his stead.

From a consideration of the whole statute it will appear that in substance, the general scope and character of the duties of an assignee under it, are essentially the same as those of an assignee in bankruptcy, and that his representative character is no less.

In one sense the former may be more truly said to be the representative of his assignor, than the latter of the bankrupt, in that he is appointed by the debtor himself, and not by the creditors. In this respect his trust more nearly resembles that of an executor. The one is created by deed duly executed and filed with the Probate Court, the other by will duly executed, probated and filed with the same court. And wherein is a will of higher legal sanctity than a deed of trust, which alike disposes

of all the estate of the grantor? Neither can execute their respective trusts until they have been duly qualified thereto, and have given the required bond: and they are alike subject to the general supervision of the same court.

In the case of an insolvent estate the trusts are parallel in respect to the disposition of the entire estate for the equal benefit of the creditors.

Applying the definition of Chief Justice Sharkey before given, that "a representative is one who exercises power derived from another," in what respect does an executor represent his testator, more than an assignee for benefit of creditors does his assignor?

In the case at bar the plaintiffs in error are admitted to be the duly qualified assignees of Barnets & Whiteside under a general deed of assignment, conveying to them all their property in trust for the benefit of all their creditors. They, therefore, stand before this court invested with all the necessary qualifications to constitute them the "legal representatives" of Barnets & Whiteside, within the meaning of the 30th section, and authorized to maintain this action, whether the right passed to them by assignment or not.

II.

They are entitled to maintain the action, because the right of action of Barnets & Whiteside under the 30th section passed to them by assignment.

1. Is is well settled that a right of action which survives to the executor or administrator, even although it arise ex delicto may be assigned.

Freeman vs. Newton & Drew, 3 *E. D. Smith, N. Y.*, 246.

McKee vs. Judd, 12 *N. Y.*, 622.

Quinn Adner vs. Moore et al. 15 *N. Y.* 432, 435.

Comegys vs. Vasse, 1 *Peters*, 213.

Grant vs. Ludlow, 8 *O. S. p.* 1.

Milnor vs. Metz, 16 *Peters* 221.

Meech vs. Stoner, 19 *N. Y.* 26.

Gray vs. Bennett, 3 *Metc.* 522.

If it be conceded that the right of action under the 30th section, is in the nature of a penalty, it is nevertheless one prescribed for an injury to the estate of the person paying the illegal interest, and not for a personal ~~loss~~ or injury, and being founded on an injury to the estate, would survive to the executor or administrator, even if Congress had not in express terms provided that it should, and therefore under rule above stated is assignable. In McKee vs. Judd, 12 N. Y. 622 above cited, the Court held "that an assignment by a person of all his property and estate transfers a right of action existing in his favor for the tortious conversion of personal property."

Hand J. in a dissenting opinion p. 627, while dissenting from a majority of the court as to the right of action in the case before the court being assignable, yet sustains the main proposition as follows: "A cause of action arising from a tortious act will sometimes pass to the assignees of an insolvent or to the assignees in bankruptcy. In those cases there can be no objection on the ground of champerty or maintenance, and the criterion is whether the action is to recover damages for an *injury to the property* of the insolvent or bankrupt, or for *a wrong personal to him*. A solatium for an injury done to the person or personal feelings of the debtor can not be assigned. But if a substantial cause of action arises from an act that *diminishes or impairs his property*, it passes to his assignees." The taking of illegal interest can not in any sense be construed to be a personal injury, but it is a substantial injury to the estate of the person paying it.

Wright vs. First National Bank, U. S. Circuit Court, District of Indiana, 18 *Alb. L. J. p.* 115.

But whether the penalty is imposed for an injury to the estate or to the person, it is immaterial to inquire, since Congress has chosen to fix upon it the *character of a debt* in favor of the party paying the illegal interest, which survives to his executor or administrator, for if the phrase "or their legal representatives" has no broader or more comprehensive signification, it can have no less effect than to cause the right of action conferred to survive to the executor or adminsistrator.

In *Quinn, administrator, vs. Moore et al.* 15 *N. Y.*, 432, cited above, it was held that the interest of the next of kin in a right of action founded on a personal tort, which, under the N. Y. Statute, survived to the administrator, was assignable.

Comstock, J., in delivering the opinion of the Court (p. 435), says: "In respect to purely personal torts it is true that, at common law, the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the Statute comes in and declares that a right of action shall survive to the administrator. * * * The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the Legislature has chosen to regard as a *pecuniary right*, a right having the *essential attribute of property*, so that when it is taken away compensation is due."

In the 30th Section Congress has declared that the taking of illegal interest by a National bank creates a right in favor of the person paying the same, which survives to his executor or administrator, to recover in an action of debt twice the amount of the interest paid. If this be in the nature of a penalty as regards the bank, as to the person paying the illegal interest, Congress has chosen to make it a "*pecuniary right*," a right having the "*essential attribute of property.*" It follows as a necessary consequence that it is assignable.

2. The right of action having passed to the assignees, they were entitled, under the provisions of the Ohio code, to maintain the action in their own name.

Under the provisions of the Ohio code all actions are required to be prosecuted in the name of the real parties in interest, except that an executor, administrator, guardian, trustee of an express trust or a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute may bring an action without joining with him the person for whose benefit it is prosecuted. It is further provided that in case the assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed.

Sections 25, 26, and 27, Ohio Code, S. & C. Stat. vol. 2, p. 951, 952, and 953.

Allen vs. Miller, 11 *O. S. p.* 377.

Fuller vs. Steiglitz, assignee, 27 *O. S.* 355, 358.

In the latter case Johnson J., in delivering the opinion of the Court says: "By Section 25 of the code of civil proceedure the real party in interest, in this instance the assignee, must sue in his own name as trustee for the creditors.

In order that this change in the plaintiff in such cases should not cut off existing rights of defense, the 26th section provides that "in case of assignments of a thing in action the action of the assignee shall be without prejudice to any set-off or other defense now allowed."

This section preserves to the debtor the same rights of defense as under the old practice."

Under the New York Code containing similar provisions, it was held in *McKee vs. Judd*, 12 *N. Y.* 622, that "a right of action for the wrongful taking and conversion of personal property is assignable, and under the provisions of the code of proceed-

ure the assignee can recover upon the same in his own name."

Lewis vs. Graham 4 *Abbott*, 106.

Meyers vs. Davis, 22 *N. Y.* 489.

Martin vs. Kunzmuller, 37 *N. Y.* 396.

The assignees of Barnets & Whiteside are, therefore, both in the capacity of "legal representatives" and as assignees of the right of action under the provisions of Section 30, legally authorized to prosecute such right of action against the defendant in error. The action of the Court below in sustaining the demurrer ought, therefore, to be reversed.

R. B. WILSON,
Counsel for Plaintiffs in Error.

CASES CITED.

Allen *v.* Miller, 11 O. S. 377.
Beach *v.* Fulton Bank, 3 Wend. 573.
Carpenter *v.* Rannels, 19 Wall. 138.
Comegys *v* Vasse, 1 Peters 213.
Crocker *v.* First National Bank, 3 Cent. L. J. 527.
Delaney *v.* Burnett, 4 Gill. 454.
Farmers &c. National Bank *v.* Deering, 1 Otto 29, 35.
Freeman *v.* Newton & Drew, 3 E. D. Smith N. Y. 246.
Fuller *v.* Steiglitz Assignee, 27 O. S. 355, 358.
Grand Gulf R. & B. Co. *v.* Brayan, 8 S. & M. 234.
Grant *v.* Ludlow, 8 O. S. 1.
Gray *v.* Bennett, 3 Metc. 522.
Hogan *v.* Paige, 2 Wall. 605.
Lewis *v.* Graham, 4 Abbott 106.
Loomis *v.* Tift, 16 Barbour 541.
Martin *v.* Kunzmuller, 37 N. Y. 396.
Mayer et al. *v.* Hellman Assignee, 13 N. B. R. 444.
Meech *v.* Stoner, 19 N. Y. 26.
Meyers *v.* Davis, 22 N. Y. 489.
Milnor *v.* Metz, 16 Peters 221.
Morrison et al. *v.* Jackson, 2 Otto 655.
McKee *v.* Judd, 12 N. Y. 622.
Pearsall *v* Kingland, 3 Edwards Ch. R. 195.
Quin Adm'r *v.* Moore et al., 15 N. Y. 432, 435.
Thomas Assignee *v.* Talmadge et al. 16 O. S. 437.
Union Bank *v.* Bell et al. 14 O. S. 210, 211.
Warnecke *v.* Lembca, 71 Ill. 91.
Wilson *v.* Mayor N. Y. 45 Howard 500.

Wright *v.* First Nat'l Bank Greensburg, U. S. C. C. Dist. Ind., 18 Albany L. J. 115.

STATUTES CITED.

Sections 25, 26, 27, 35, 87, 101 Ohio Code of Civil Procedure, S. & C. Stat. Vol. 2.

Act. regulating assignments for benefit of creditors, 1 S. & C. Stat. 709: S. & S. Stat. 396, 397.

Revised Stat. U. S. Section 914.

Revised Stat. U. S. Section 5198.

Robert Clarke & Co., Printers, Cincinnati, O. [*Dec.*, 1878.

IN THE

Supreme Court of the United States,

David Barnet, etc., Assignees of Barnets & Whiteside.

Plaintiffs in Error,

against

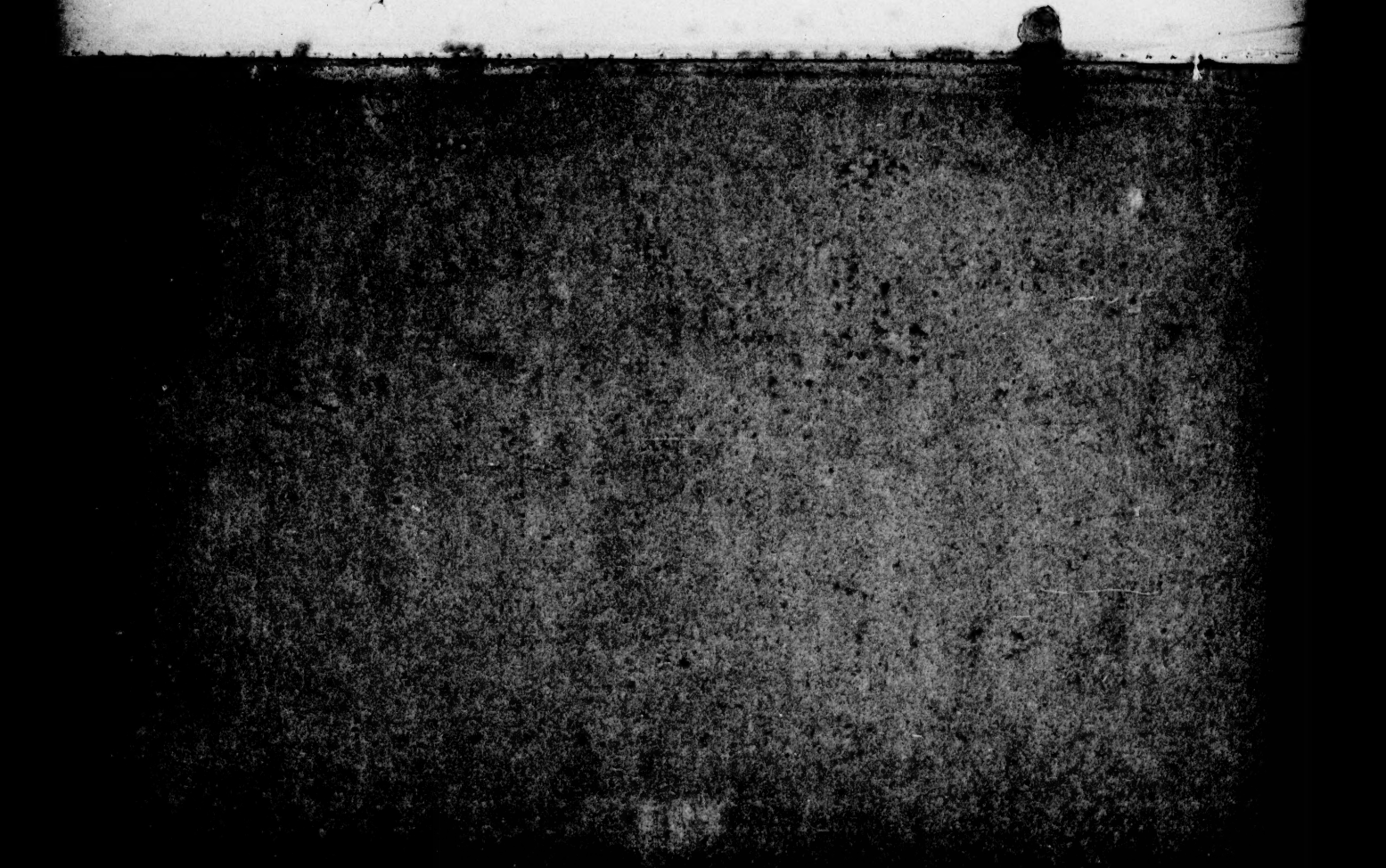
The Muncie National Bank.

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

ARGUMENT FOR DEFENDANTS IN ERROR.

HAGANS & BROADWELL,
Counsel.



Robert Clarke & Co., Printers, Cincinnati, O. [*Dec.*, 1878.

IN THE

Supreme Court of the United States,

David Barnet, etc., Assignees of Barnets & Whiteside.

Plaintiffs in Error,

against

The Muncie National Bank.

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

ARGUMENT FOR DEFENDANTS IN ERROR.

As all the other issues in this cause have been tried and gone into judgment, they are not here on error. The first answer is not only called by the plaintiffs in error a cross-petition, but it is so in fact as well as in form.

The first defense and cross-petition sought to set off the forfeiture of the alleged usury on other and independent transactions. Section 97 of the Ohio code of civil procedure provides as follows: "A set-off can only be pleaded in an action arising upon contract or ascertained by the decision of the Court. This claim is neither.

Hade v. *McVay et al.*, 31 Ohio St. 231.

The only question, therefore, is whether these plaintiffs in error can maintain their action.

It is true this Court says, in *Farmers', etc., National Bank* v. *Deering*, 1 Otto, 29: "The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in enacting it."

This may be well said of the first clause of this section. For it is remedial in that it gives the party the right of recoupment against the debt sued on; but penal in providing for the "forfeiture of the entire interest which the note, etc., carries with it, or which has been agreed to be paid thereon." But the second clause of that section, under which the plaintiffs in error bring their suit, is wholly penal, and must be strictly construed. It does not follow from the statement in that case that Congress "intended to enlarge and not restrict the rights conferred under it." This is but another form of asking the Court to make it still larger than Congress has done, and to confer rights which the act does not. It is not the enlargement of the *remedy* which the plaintiffs in error seem to desire. That is amply provided for in that section. But it is the enlargement of the *right of action* at the hands of the Court; that is the real scope of their demand and of the argument to enforce it.

The only question is what is meant by the words "*legal representatives*" in that section. If Congress had intended to extend the *right of action* to the *assigns* of the person paying the usurious interest, "would it not have used that very word to express that intention?" If Congress had intended an enlarged meaning, it would have used unqualified language. The fact that it did not do so, furnishes a conclusive argument against any legislative intention to enlarge the right beyond the signification of the term used. *Expressio unius, exclusio alterius*, is a maxim that applies with overwhelming force to a penal statute,

and furnishes a clear indication that the term was intended to be used in a restricted sense.

The words "*legal representatives*" have a well-defined signification, and for the purposes of this statute must be strictly construed. It is well-settled law, found in all the text-books and law dictionaries, and in numerous adjudicated cases, that these words mean administrator, executor, or heir. All other meanings are exceptions growing out of the facts of each case.

It is to be observed of the cases cited by counsel, and many others that could be cited, that they all relate to the succession of real estate; and the meaning given to the words grew out of the contracts founded sometimes on legislation respecting them, and *never ex delicto*.

It is a term that must be taken in its legal sense, and held to be one who is such by operation of law as distinguished from one who is created by the act of the assignor. Not one case of tort or penalty can be found where this term is by implication or construction of enlarged signification.

Chancellor Kent (1 Kent's Com. 462) says: "The words of a statute, if of *common use*, are to be taken in their natural and ordinary signification and import." Again: "The words of a statute are to be taken in the sense that would convey the meaning required, to all men of ordinary discernment alike, and that may be called certain without recurring to possible facts which do not appear."

Ib., note *f*, citing 9 Vt. 269.

"The current authors on construction are in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts can not correct

what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good."

Walter v. *Harries*, 20 Wend. 561.

It is asked by counsel whether there is "any reason why the meaning of this term should be so restricted in the present case more than in the cases cited? Is there any good reason why Congress should give to the creditors of a deceased person having such right of action the benefit of it through his executor or administrator, and deny the same benefit to them through an assignee for the benefit of creditors or in bankruptcy?"

We answer not one only, but several. We are aware that it has been held by the courts of two or three circuits of the United States, that the right of action under the second clause of the thirtieth section of the national bankrupt act, passes to an assignee in bankruptcy. That the 5046th section of the Revised Statutes is broad enough to cover it, with great deference we shall not stop to argue. It is not necessary. It is respectfully submitted, however, that there are a number of rights of action that do not pass. But the case at bar presents a totally different question, and one which stands alone on the language of the thirtieth section of the act, without any aid from other legislation or construction.

The assignment act of Ohio is quite different in scope and effect from the bankruptcy act. And there is a wide divergence between an assignee under the assignment act and in bankruptcy.

Among others, the effect of the assignment is not to transfer and vest the property of the insolvent absolutely and forever; and the assignee is a trustee, not for the creditors alone, but also for the assignor. The property

does not pass beyond his control or interest, and he obtains no discharge from the obligation of his debts. Immediately, on the adjudication in bankruptcy, the estate of the bankrupt is divested absolutely and entirely and vests in his assignee.

The assignee in bankruptcy is a creature of the law, and the assignee, under the assignment act, is the creature of the assignor. That act does not create the assignee. It only recognizes him and regulates his conduct. It does not give him ownership. The estate belongs to the assignor; the equitable title is *his;* but to be administered by the assignee for the benefit of *his* creditors, and he is responsible to both the assignor and them, for he has an absolute right to any surplus after the payment of his debts and the expenses of the assignment. He is not any different from a simple assignee in respect of the principle involved in this case. The arguments of the plaintiffs in error drawn from this source are wholly inapplicable.

Quoting again, Chief Justice Sharkey (8 S. & M. 234), "a representative is one who exercises power derived from another." How? By deed, will, or operation of law. By deed, when the conveyance is executed and delivered. By will, when probated and by virtue of some enactment, or according to the common law. It is by virtue of the enactment of Congress, that it is argued that these plaintiffs have a standing in Court. For though here a deed of assignment was executed, still unless this right of action passed under it to the assignees according to that act, to be exercised in the form in which we find it, the action can not be maintained.

As long as Barnets & Whiteside are living—and there is no allegation in the pleadings and it is not claimed that they, or either of them, are dead—they, alone, can bring this action, or, at least, we say that it must be brought by them for the use of their assignees, or in the name of the

United States for the use of Barnets & Whiteside. The assignees can not maintain this action in their own names, while the assignors are living. The assignors can maintain the action, and only their administrators or executors after they are dead.

The action authorized by the thirtieth section is an action "*in the nature of an action of debt*," not an action of debt.

Passing by all exception to the form of the cross-petition, the statute gives to the *party aggrieved* the whole penalty, and a heavy one it must be admitted to be. Now, this statute confers a right of action *qui tam*, and certainly the plaintiffs in error can not maintain it in their own names.

The code of Ohio, like the code of New York, nor yet the thirtieth section of the bank act, creates no *new right of action* in the assignees; and if it is not assignable, so as to allow the assignees to bring it in their own names, that is an end of this case.

The *party aggrieved* is the only person who can bring the action in his own name. It is wholly and entirely *personal*, and there would be no survival of the action, but for the language of the act.

Shoemaker v. *Kelly*, 2 Dall. (Pa.), 213.

The codes referred to, in all cases where the right of action is assignable, merely transfers to the assignee, with the beneficial interest, the right of action also, and *only* in those cases, where before the Court would recognize and protect the assignee. They do not enlarge assignability. No authority is given to assign a right of action, where it was not before assignable.

The thirtieth section gives no such right or authority.

The twenty-fifth and twenty-sixth secs. of the Ohio code are as follows: "Every action must be prosecuted in

the name of the real party in interest." "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed, etc."

In Ohio, there are classes of cases not actions *qui tam*, where the assignee must still bring his action in the name of the assignor; such as cases for street assessments and the like. And a right of action against a justice for neglect to issue an execution in favor of an indorser, on payment by him to the owner of the note, is not assignable.

Dehn v. *Heckman*, 12 Ohio St. 181.

Actions on official bonds, contracts for personal services, franchises, licenses, and the like, are not assignable.

But this right of action by the party agrieved is a *personal action strictly*. It does not survive, except by the act of Congress, as we have said, and is not assignable.

Any implication so as to embrace *choses in action*—such as penalties and some classes of torts—"would produce great absurdities, would lead to dangerous practices, and would be a premium for the commission of champerty and maintenance, and would bring the legislation and the judicial system of the State into well-merited contempt."

Oliver v. *Walsh*, 6 Cal. 456.

Davis v. *Herndon*, 39 Miss. 481.

Goodwin v. *Lloyd*, 8 Porter, 237.

And their assignment is therefore void as against public policy, and tends to promote litigation.

McGoon v. *Ankeny*, 11 Ill. 558.

This being an "action in the nature of an action of debt," the party has no interest in the penalty until after judgment in his favor, and therefore had nothing to assign. It would then belong to the assets of the insolvent.

Confiscation cases, 7 Wall. 454.
Distilled Spirits, 1 Ben. 367.
Bank of St. Mary's v. *Georgia*, 12 Ga. 475.

There is a class of claims for torts which are by statute, in some of the States, made transmissible to an executor or administrator, which are assignable *in equity*. In Ohio, some of them are assignable; but this principle requires that the assignor be a party to any suit brought.

Grant v. *Ludlow*, 8 Ohio St. 1.

Without such transmissibility they die with the person.

Deal v. *Holter*, 6 Ohio St. 228.
The Mil. & Min. R. R. v. *Mil. & West. R. R.*, 20 Wis. 174.
Hyslop v. *Randall*, 4 Duer, 660.
Purple v. *Hudson River R. R.*, 4 Duer, 74.
Gardner v. *Adams*, 12 Wend. 297.
Lamphere v. *Hall*, 26 How. (Pr.), 509.
Zabriskie v. *Smith*, 3 Kern. 322.
Butler v. *N. Y. & E. R. R.*, 22 Barb. 110.

It is said broadly, that a right of action which survives to the executor or administrator, even though it arise *ex delicto*, may be assigned. And a number of cases are cited, which, we respectfully submit, do not affect this case.

An examination of the cases evolves the general principle that, where no property is affected by the tort, and it has no relation to any specific or distinct property or interest, the right of action might be transmissible to executors or administrators, if made so by statute.

Zabriskie v. *Smith*, 3 Kern. 322, was an action for fraud and deceit, vouching for the solvency of a person who obtained credit from the plaintiff. The Court says:

"There was a resulting damage to the plaintiff's estate, but this was as much an element for fixing the compensation, as of the essence of the tort. So with assault and battery, slander, and the like. They may all consequentially affect a man's estate, but, because they are wrongs practiced upon him personally, they fall within the class of personal actions. Torts, which operate upon specific things, or tangible rights or interests, *themselves capable of assignment, and so separable from the person*, seem to be the only class of torts which are assignable; other wrongs done to a party, although they may consequentially impair his estate, are personal, because they only affect his estate through himself. They are not allowed to be transferred, as instruments of litigation into other hands." We say, that a penalty is neither a debt, a pecuniary right, having the essential attribute of property, or an injury to property or estate, nor is it property itself. The thirtieth section has reference only to the agreement or transaction between the bank and its customer. It is the party with whom the bank had the transaction to whom the penalty is awarded, and that can recover the penalty, or his legal representatives after he is dead, and that not by virtue of any contract, express or implied,. It is a statutory right of action, and without the statute would have no existence whatever. But there is a great difference between a tort and a penalty. The latter is a *fixed* sum, under all circumstances, denounced by a statute against the act sought to be prevented, and where there is awarded the party aggrieved, or the informer, the whole, or any part of the recovery, an assignee can not maintain the action where there is put on the assignor the performance of a corresponding duty or obligation, before he brings suit, unless the assignment carries such duty or obligation with it, and imposes the performance thereof

on the assignee. The assignees in this case are not bound to perform any duty in respect of the debt, or under any obligation to pay it. Third persons, it is well settled, can not avail themselves of the usury; much less can any party to the paper discounted, other than the ones obtaining the money. The doctrine claimed by the plaintiffs goes to the extent that Barnets and Whiteside could have assigned to anybody. They might, in Ohio, transfer their "debt" to any creditor, in satisfaction of his debt, and that, too, without paying the acceptance sued on; and then make an assignmsnt afterward, under the Ohio law. That creditor-assignee could bring the action in his own name, and prove his "debt" by the oaths of Barnets and Whitesides, and recover judgment. Such an assignment would hold out no relief to the borrower; it would be only transferring his money from the pocket of the lender to the pocket of the creditor. Further, Barnets and Whiteside, under proper circumstances, have the right and power, leaving the debt unpaid, to *give* their right of action accruing under the thirtieth section away, and, without consideration, transfer the same, and the donee could maintain the action, and recover judgment. We should thus have the extraordinary case of parties suing for, and recovering, this penalty, who were not bound by the original contract. There is no forfeiture, under the act of Congress, of the debt. The obligation to pay that remains, and the assignment of the debt carries with it no obligation, on the part of the assignees, to pay it. *These defendants have not committed any act for which they are to be punished, as for a crime, irrespective of the existence or extinguishment of the debts upon which the usury is alleged to have been received or reserved.* We do not conceive that any such consequences follow the admission that this claim is assignable,

because it is transmissible, by statute, to executors and administrators.

It will be observed by the Court that the suit in this case is upon the acceptances of Barnets and Whiteside, whose "legal representatives" under the thirtieth section, the plaintiffs in error claim to be. Admitting they are so, and have a right to sue for the penalties they demand, they nowhere either allege repayment of the moneys they obtained from the bank, or a tender of the sum borrowed, before action brought by them. This is equity. The debt is not forfeited by the national bank act, by taking or reserving the usury.

Fitzroy v. *Gwillim*, 3 T. R. 153. This was a case of an equitable action to be relieved from an usurious contract. Lord Mansfield held: "The plaintiff must come with clean hands, and those who seek equity must do equity."

The lender is precluded from recovering anything upon the contract; but if the borrower seek relief he must first do what is right between the parties. Here plaintiff does not tender what had been actually advanced, and can not, therefore, have the benefit of this equitable action.

Butler, J.: "It is the plaintiff who discloses and relies on the usurious contract, in order to take advantage of it. The borrower brings the action. She has done nothing to entitle herself to the relief she claims." Rule for new trial refused.

Such was the law of England, and such was the law in New York until a recent period.

In *Livingston* v. *Harris*, 11 Wend. 330, under the usury act dispensing with the payment, or offer of payment, of interest on the filing a bill of discovery of the money, etc., received in violation of the provisions of the

act, it was held that the complainant must pay, or offer to pay, the principal, or the sum actually lent. "Previous to this act," says the Court in that case, "neither discovery or *relief* could, in any case, be obtained in a Court of Chancery without repayment of the sum actually lent, with interest. At law his defense was complete if he could prove the usury, and the debt was forfeit; but if he went into Chancery for discovery he waived the forfeiture, and must pay the debt."

In *Post* v. *Bank of Utica*, 7 Hill, 391, it was held: "That a subsequent grantee of premises covered by an usurious mortgage is not a 'borrower' within the meaning of the usury act, and, therefore, can not maintain a suit in equity to set aside the mortgage, without paying, or offering to pay, the sum actually loaned." The Court, in that case, discussing who is designated by the word "borrower," Mr. Senator Wright said: "A surety of the borrower, his heirs, devisees, and personal representatives, can be included in the spirit of the language of the section. A *surety*, though not the actual recipient of the money loaned, is yet a party to the original contract, and is liable on it equally with the principal who borrows the money. The *heir*, *devisee*, and *personal representatives*, although not immediate and direct parties to the original contract, are bound by it when they succeed to the estate of the testator or intestate. They are liable on the *original* contract, and not in virtue of any *new* one."

Rexford v. *Wiger*, 2 Comstock, 131.

In *Boughten* v. *Smith*, 26 Barbour, 635, the Court held that assignees were excluded, notwithstanding the right under the statute survived to *personal representatives*, sureties, heirs, and devisees. Judge Smith says, after assuming that the plaintiffs in that case were assignees, who sought to compel the debtor to get rid of certain usurious

claims in order to get their money: "It seems very clear that the right of action to cancel or avoid notes, bills, securities, or other contracts, on the ground of usury, or to have the same surrendered, *is not assignable.* If the defense or right of action *is limited to the borrower and his legal representatives, assignees can not maintain it. They are clearly not included.* It is a statute right of action. The right of recovering back, and to avoid all contracts tainted with the usury, is in the nature of a penalty, and a heavy penalty. It is within the principle of the case of *Weyburn* v. *White*, 22 Barb. 82. There is no *legal* or *equitable* interest to assign. The right of action rests in and upon the statute. The parties make a corrupt and illegal agreement. Both agree to violate the statute, but the law deems it best to punish him who takes the usury, as the most efficient means to prevent the commission of the crime. It imposes on him the loss of all he loans. This is a severe penalty. It is given to the *person injured.* It is a right of action or defense that only exists by virtue of the statute, and is, by well settled rules of interpretation, limited *to the party injured and his legal representatives. He can not assign it; he can not allow another person to sue for it in his name; he can not barter the right of action. The real party must appear upon the record, or some one bound to pay the debt in his stead, and demand the statute penalty.*"

In *Ready* v. *Wiston*, 7 Conn. 413, Chief Justice Hosmer says: "It has been long and uniformly established law, that one not a party to an usurious contract, may not for this cause invalidate it. The reason is extremely obvious. The law of usury was made to prevent oppression and to rescue the party oppressed; *but it never was intended for the benefit of those who are not and can not be injured by an usurious transaction.*"

These cases are exactly to our purpose. The plaint-

iffs in error are not parties to the paper discounted, are not bound to pay it, are not and can not be injured by the usurious transaction, and are not and can not be oppressed by the limitation which we claim. And to hold that these assignees can assert in their own names such a demand as this, is to say that there may *be a right without any corresponding duty*. "If the person who actually received the money," says Mr. Justice Sutherland, in *Livingstone* v. *Harris, sup.*, "is entitled to relief, *a fortiori*, should he be, who, although he did not receive it, is called on to pay it." The estate of Barnets & Whiteside after their death, has cast upon it the duty and obligation of paying the debts of the estate, and their legal representatives may avail themselves, in a proper case, of this defense or right of action. As such, they would stand in the shoes of Barnets & Whiteside; as assignee, they do not.

It will not do for the plaintiffs to say, that the cases we have cited are cases in equity, and that this case stands on an action "in the nature of an action of debt," and, therefore, there is no pertinency or relevancy in them. But the court is *construing a penal statute*; and that construction excludes these plaintiffs.

The principle we contend for is one of common justice. These plaintiffs rest on the naked language of the act. There is nothing in it that does not require them to be and do as other honest men in the transaction of business. There is nothing to relieve them from the plain duty of paying this debt before they assert their demand. Otherwise, they seek something for nothing, and plead that they are under no obligation of repayment —contract or statutory—and never were, and can not be; nay, more, that in most cases, judgment could not be rendered against them as fiduciaries for the debt, and no consideration between them and the defendants upholds

their claim; nay, further, that though the estate of Barnets & Whiteside is so insolvent that it can not even pay the expenses of administration, they have the right of recovery. We do not think so. And the creditors of the insolvents are in no better situation.

We may add that the late Judge Emmons, of this, the Sixth Circuit, decided this demurrer after full argument; and Judge Baxter, the present Judge, decided this question in the same way recently in Cleveland, after full argument, and another like case in this city still more recently. The case in Cleveland was that of a purchaser who had acquired his interest by a simple assignment; and upon demurrer to the petition, it was sustained.

HAGANS & BROADWELL,
Counsel for Defendants in Error.

CINCINNATI, *December* 17, 1878.